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SUPREME COURT CIVIL DIGEST

(1950—1962)

By

C. S. VENKATASUBRAMANIAN,

Advocate, Madras High Court

With a Foreword

By

SHRI T. L. VENKATARAMA AIYAR,

formerly a Judge, Supreme Court of India

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Judges of the Supreme Court of India.

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Saiyed Fazl Ali.
M. Patanjali Sastri. (*Chief Justice*)
Mehrchand Mahajan. (*Chief Justice*)
Bijan Kumar Mukherjea. (*Chief Justice*)
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T. R. Mudholkar.
Sarvamittar Sikri.

FOREWORD

It is now nearly fourteen years since the Supreme Court was established. It has pronounced during this period quite a large number of decisions reported in about twenty volumes in the authorised series and covering practically all branches of law. The need has therefore arisen for a good and reliable digest of the decisions of the Supreme Court, such as will be useful to persons engaged in the administration of law—lawyers, judges and other authorities. The present is one of the publications intended to satisfy this need. The author is a well known advocate of Coimbatore and he has brought to bear considerable learning, research and care in compiling this work. So far as I have seen, it is clear and accurate and bound to be useful.

11-1-64

T. L. VENKATARAMA AIYAR

PREFACE

In former days law used to be divided into two kinds, viz., Civil Law and Criminal Law. But with the advent of the concept of the Welfare State and the consequent increasing legislative activity of the State touching almost every sphere of human endeavour laws have increased manifold and new kinds of laws, e.g., taxation law, Industrial law, election law etc, have sprung up. Although these are really parts of civil law, in its wider sense, they have a distinctness of their own which defies certain definitions of conventional civil law. Administered by special tribunals these require lawyers of certain specialised training. Notwithstanding all this specialisation, the vast majority of lawyers to-day are still conventional civil lawyers practising before the ordinarily constituted civil courts. But the world is moving so fast in these days that like Alice in Wonderland even the civil court practitioner has to keep running in order to stay where he is. It is with his needs in view that this digest has been prepared.

The Supreme Court of India which was constituted in 1950 when the country became a Republic, has fulfilled and is fulfilling in a very large measure the hope expressed at the inaugural sitting of the Court on 28.1.1950 by Hon'ble Chief Justice Harilal Kania that the Supreme Court would play a great part in the building up of the nation by maintaining the fundamental principles of Justice which are the emblem of God and the high traditions of the Judiciary and performing its duties without fear or favour.

Many brilliant judges have adorned the Bench of the Supreme Court and have rendered illuminating judgments which are being cited with approval even in the courts of other countries. These judgments, reported in various journals, official as well as non-official, have, no doubt, been digested from time to time in certain other Digests, but it is believed that a Digest of the present type is likely to be of optimum use to the civil court practitioner. Care has been taken to leave out cases which are not likely to be of any practical interest to the civil court practitioner. (There are specialised journals and Digests serving those fields). This book is a result of such an effort. It has conciseness and economy as two of its qualities even if nothing else could be said in its favour.

Like other Digests this Digest also attempts to give the *Ratio Decidendi* of each case in the words of the judges themselves and wherever possible parallel references to all the various law reports are given. The usual table of cases digested and the table of cases Reversed, Overruled etc are appended. A cross reference index which would not, for certain unavoidable reasons, be incorporated in the body of the Digest itself is also added at the end.

A novel and, it is hoped, useful feature of this Digest is the extracting, in certain cases, of the relevant portions of the statutory provisions bearing on the case digested. Pundits may cavil at such mutilation of the statutes. But it is believed that

this system will help in understanding the import of the decisions better. Though every care has been taken to make the work accurate and exhaustive, so far as it goes, errors and omissions are bound to have crept in. The indulgence of the readers is craved in this respect. Suggestions for improvement are welcome.

If what began as a mere study of the reported judgments of the Supreme Court has culminated in this book, it is mainly due to the encouragement and assistance offered by my esteemed colleagues Sri N. Varadarajan, Advocate, Madras, and Sri M. V. Ramachandran, Advocate, Coimbatore, who actually did a major portion of the work relating to the years 1955 to 1957.

It is my good fortune to have this work published by such a reputed firm of publishers as M/s S. C. Sarkar and Sons Private Ltd., Calcutta, who with their rich experience offered me valuable suggestions to make the book more useful to those for whom it is intended.

I deem it a great honour that Sri T. L. Venkatarama Aiyer, one of our most distinguished and respected judges of the Supreme Court of India, should have consented to write a foreword to this work. I offer my respectful thanks to him. My thanks are also due to Mr. C. R. Lakshminarayana Iyer, Advocate, Coimbatore and the Bar Association, Coimbatore, whose libraries were ever at my disposal for consultation.

The bulk of the manuscript of this work was carefully typed by my friend M. Ramaswamy who (alas !) is not alive to-day to see this work in print and to his memory, I dedicate this, my humble work.

Coimbatore
22-2-1964

C. S. VENKATASUBRAMANIAN

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List of Abbreviations used.

A. M. L. J.	..	Ajmer Merwara Law Journal.
All.	..	All India Reporter Allahabad series.
(All.)	..	Indian Law Reporter Allahabad series.
A. L. J.	..	Allahabad Law Journal.
All. E. R.	..	All England Reports.
A. W. R.	..	Allahabad Weekly Reporter.
An. Pr.	..	A. I. R. Andhra Pradesh series
An. W. R.	..	Andhra Weekly Reporter.
Assam	..	A. I. R. Assam series.
Bhopal	..	A. I. R. Bhopal series.
B. L. J. R.	..	Bihar Law Journal Reports.
Bom.	..	A. I. R. Bombay series.
(Bom.)	..	I. L. R. Bombay series.
Bom. L. R.	..	Bombay Law Reporter.
Cal.	..	A. I. R. Calcutta series.
(Cal.)	..	I. L. R. Calcutta series.
C. L. J.	..	Calcutta Law Journal.
(Cuttack)	..	I. L. R. Cuttack series.
C. L. T.	..	Cuttack Law Times.
Com. Cas.	..	Company Cases.
Cr. L. J.	..	Criminal Law Journal.
DLR. S. C.	..	Dominion Law Reports Supreme Court series.
C. W. N.	..	Calcutta Weekly Notes.
F. C.	..	A. I. R. Federal Court series.
F. C. R.	..	Federal Court Reports.
Him. Pr.	..	A. I. R. Himachal Pradesh series.
Hyd.	..	A. I. R. Hyderabad series.
I. A. or Ind. App.	..	Law Reports. Indian Appeals.
I. C.	..	Indian Cases.
I. T. R.	..	Incometax Reports.
J. & K.	..	A. I. R. Jammu & Kashmir Series.
K. L. T.	..	Kerala Law Times.
Lah.	..	A. I. R. Lahore series.
(Luck).	..	I. L. R. Lucknow series.
L. W.	..	Madras Law Weekly.
M. B. or Madh. Bh.	..	AIR Madhya Bharat series.
M. B. L. J.	..	Madhya Bharat Law Journal.
Madh. Pr.	..	A. I. R. Madhya Pradesh series.
Mad.	..	A. I. R. Madras series.
(Mad).	..	I. L. R. Madras series.
M. H. C. R.	..	Madras High Court Reports.
M. L. J.	..	Madras Law Journal.
M. L. T.	..	Madras Law Times,

M. W. N.		Madras Weekly Notes.
M. I. A.	.	Moore's Indian Appeals.
Mys. L. J.	.	Mysore Law Journal.
Nag.	.	A. I. R. Nagpur series.
(Nag.)		I. L. R. Nagpur series.
Nag. L. J.	..	Nagpur Law Journal.
Orissa	.	A. I. R. Orissa series.
Oudh	..	A. I. R. Oudh series.
O. W. N.	..	Oudh Weekly Notes.
Pat.	..	A. I. R. Patna series.
(Pat.)	..	I. L. R. Patna series.
Pepsu	..	A. I. R. Pepsu series.
(Patiala)	..	I. L. R. Patiala series.
Punj.	..	A. I. R. Punjab series.
(Punj.)	..	I. L. R. Punjab series.
Pun. L. R.	..	Punjab Law Reporter.
P. R. or Pun. Re.	..	Punjab Records.
Raj.	..	A. I. R. Rajasthan series.
R. L. W.	..	Rajasthan Law Weekly.
Sau.	..	A. I. R. Saurashtra series.
S. C.	..	A. I. R. Supreme Court series.
S. C. A.	..	Supreme Court Appeals.
S. C. C.	..	Supreme Court Cases.
S. C. R.	..	Supreme Court Reports.
Sind	..	A. I. R. Sind series.
T. C.	..	A. I. R. Travancore Cochin series.
Vindh Pr.	..	A. I. R. Vindhya Pradesh series.

CORRIGENDA

At page	17	in line	19			from top, *for* "*Ram Narain* v. *Simla Industrial & Banking Co. Ltd.*, (*ibid*)" *read* "*Dhirendra Chandra Pal* v. *Associated Bank of Tripura Ltd.*, 1955 SCR 1908."
,,	,,	153	,,	,,	10	from top, *for* "1954 FCR" *read* "(1945) FCR."
,,	,,	230	,,	,,	11	from top, *after* "See" and *before* "1958 SC 832" *add* "*Neelakantan D. Namboodri* v. *Velayuthan Pillai*,".
,,	,,	287	,,	,,	19	from top, *for* "47 Mad 1361" *read* "47 Mad 136."
,,	,,	325	,,	,,	18	from bottom, *for* "1951 Cal. 125" *read* "1951 Cal 25".
,,	,,	342	,,	,,	10	from bottom, *after* "1948 Bom 254 Affirmed" *read* "1951 Mad 276 Impliedly Overruled".
,,	,,	372	,,	,,	13	from bottom, *above* the case name *read* "1944 Bom 105 Reversed."
,,	,,	388	,,	,,	17	from top, *above* the case name *read* "1946 Mad 419 Reversed on facts."
,,	,,	401	,,	,,	1	from bottom, *omit* "Order in 1957 Andh. Pr. 1047 sustained."
,,	,,	446	,,	,,	4	from top, *for* "1961 Nag 39" *read* "1916 Nag 39".

ADVERSE POSSESSION

Requirements—Co-heirs.

The ordinary classical requirement of adverse possession is that it should be *nec vi, nec clam, nec precario.*

The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.

But as between co-heirs, it is not enough to show that one of them is in sole possession and enjoyment of the profits. Ouster of the other co heir by the one in possession must be made out. The co-heir in possession cannot render his possession adverse to the other merely by any secret hostile animus on his own part in derogation of the other co-heir's title. There must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment to the knowledge of the other as to constitute ouster. This does not necessarily mean that there should be express demand by the one and denial by the other.

A situation where one co-heir takes and maintains notorious exclusive possession in assertion of hostile title and the other takes no steps to vindicate his title, may well lead to an inference of ouster if other circumstances concur. The burden of making out ouster is on the person claiming to displace the lawful title of the co-heir by adverse possession.

Case Law referred to. (JAGANNADHA DAS J.)

P. Lakshmi Reddy v. *L. Lakshmi Reddy*, 1957 SCR 195 : 1957 SC 314 : 1957 SCA 197 : 1957 SCJ 248 : 1957 (1) Andh WR 46.

Possession under invalid transfer.

There can be in law, under certain circumstances, adverse possession with the consent of the true owner. A common illustration of this rule is furnished by the class of cases where the legal owner of a property transfers it to another without the requisite legal formalities and though the transferee does not acquire a legal title to it by the transfer yet if he gets possession of the property though with the consent of the transferor that possession becomes adverse to the owner and if continued for the statutory period creates a title in him. (MUKHERJEA J.)

Chennabasavappa Gowd v. *Mahabaleshwarappa*, 1954 SC 337 : 1955 (1) SCR 131 : 1954 SCJ 475 : 1954 SCA 835 : 1954 Andh LJSC 75 : 1954 (1) MLJ 714 : 1954 MWN 541.

Mortgagee.

When a mortgagee comes into possession of the property pursuant to a usufructuary mortgage, his possession has a lawful origin. In such a case a mere assertion of an adverse title on his part cannot affect the subsisting equity of redemption of the mortgagor or operate to shorten the period of limitation prescribed for a suit for redemption. (S. R. DAS C.J.)

Lilachand Tuljaram v. *Mallappa Tukaram*, 1960 SC 85 : 1960 SCJ 96 : 62 Bom LR 134 : 1960 (1) SCR 693.

Receiver's Possession—tacking of.

A Receiver being an officer of Court, his possession is exclusively the possession of the Court, the property being regarded in the custody of the law, *in gremio legis*, for the benefit of whosoever may be ultimately determined to be

entitled thereto. But this doctrine does not enable a person who was not previously in possession of the suit property to claim that the Receiver must be deemed to have taken possession adversely to the true owner merely because he ultimately succeeds in getting a decree for possession against the defendant therein who was previously in possession without title. To treat such Receiver as the agent of the plaintiff for the purpose of initiating adverse possession of the plaintiff would be to impute wrong-doing to the Court and its officers.

After the death of one V, one H claiming to be an heir sued the person in possession who claimed exclusive title. The claims of another co-heir, not a party to the suit, were ignored. A receiver was appointed in the suit and he took possession. H ultimately succeeded and took possession from the Receiver. Subsequently after the death of H, the other co-heir sued to recover possession from the successors-in-interest of H within 12 years from the date when H took possession from the Receiver but more than 12 years from the date when the Receiver took possession. It was contended that H's possession was adverse to the plaintiff and that the Receiver's possession must be tacked on to that of H and hence the suit was barred by limitation.

Held, (negativing the contention), that the plaintiff could not have sued the Receiver when he was in possession nor was he obliged then to file a futile suit for possession either against H or the defendant in H's suit, and that adverse possession of H did not commence when the Receiver was in possession for even if the animus of H when he filed his suit was to exclude the other co-her his adverse possession could not commence unless he obtained actual possessioiin with the requisite animus. (JAGANNADHA DAS J.)

P. Lakshmi Reddy v. *L. Lakshmi Reddy*, 1957 SCR 195 : 1957 SC 314 : 1957 SCA197 : 1957 SCJ 248 : 1957 (1) MLJ 46 : 1957 (1) Andh WR 46.

Purchaser in prior Mortgage suit.

Adverse possession cannot affect the right of a prior mortgagee to bring the properties to sale and adverse possession against the purchaser under that sale cannot commence prior to the date of that sale.

(VENKATARAMA IYER J.)'

Nagubai v. *Sham Rao*, 1956 SCR 451 : 1956 SC 593 : 1956 SCA 959 : 1956 SCJ 955 : 1956 SCC 321 : (1956) Mys 152 : 1956 Andh I.T 1029.

Prescription of limited interest.

Where the grant of a Jagir is only for the lifetime of the grantee and his son when he gets the Jagir gets it under a fresh grant, it is not open to the Jagirdar to make an alienation (*e. g.*, grant a permanent lease) which will enure beyond his lifetime unless he is specifically entitled o do so under the Sanad or the law of the State. If he grants a permanent lease, the same may be good in his lifetime but it is void and inoperative after his death, the succeeding Jagirdar need not avoid it and can just ignore it as void. Therefore in the case of a permanent lease granted by a Jagirdar it will be impossible for the lessee to prescribe for a limited interest of a permanent lessee by adverse possession, for in such a case the limitation will start to run against the heir only from the date when his title accrues on the death of the previous Jagirdar and no advantage can be taken of any running of time against the previous holder of the Jagir unlike in the case of a permanent lease granted by the trustee or manager of a temple which is not void *ab initio* and unless avoided by the succeeding manager, may not be rendered inoperative.

63 Ind. App. 261 distinguished ; 1946 P. C. 59 followed. (WANCHOO J.)

Rameshwar Rao v. *Raja Govind Rao*, 1961 SC 1442.

Widow's estate.

Where a Hindu widow who is not an heir of the deceased but is only entitled to maintenance enters into possession of the property of the deceased and there is nothing to show that she entered into possession, claiming only a widow's estate therein as an heir, or that she took possession in lieu of her maintenance by an arrangement with the real heirs of the deceased, her possession must be taken to be adverse to the real heirs and she cannot be considered to have prescribed only to a widow's estate.

29 Ind. App 132 Relied on. (A. K. SARKAR J.)

Kirpal Kumar v. *Bachan Singh*, 1958 SCR 948 : 1958 SC 199 : 1958 SCJ 438 : (1958) Punj. 807.

Where the widow of a Hindu who inherited a half share in the self-acquired property of her husband, a *Sudra*, was in adverse possession of the other half share inherited by her husband's illegitimate son also; *Held*, she would have acquired a title by adverse possession in respect of the other half share only in her capacity as owner of a limited estate, i.e., in regard to her half share she held it as a widow's estate and in respect of the other half share she acquired a right by adverse possession only to a limited interest therein and therefore on the death of the widow succession opened out and the illegitimate son, as the nearest heir succeeded to the entire estate. (SUBBA RAO J.)

Singhai Ajit Kumar v. *Ujayar Singh*, 1961 S. C. 1334.

[NOTE:-Case before the Hindu Succession Act, 1956.]

Coal mines.

Even though it may not be necessary, for the purpose of establishing adverse possession over a coal mining area to carry on mining operation continuously for a period of 12 years, continuous possession of the mining area and the mine will be a necessary ingredient to establish adverse possession. It is true that the nature of possession to establish adverse possession may vary in each case. But where during the period when there are no mining operations, no kind of possession by the person claiming title by adverse possession is proved, the presumption of law is not rebutted that during the period when the operations cease to be carried on, the possession will revert to the true owner. (KAPUR J.)

Kashi Bai v. *Sudha Rani Ghose*, 1958 SC 434 : 1958 SCR 1402: 1959 SCA 122 : 1958 SCJ 834 : (1958) 2 An WR 117 : (1958) 2 MLJ 117 : 37 Pat 985.

Fishery rights.

An exclusive right of fishery in a given place means that no other person has a co-extensive right with the claimant of the right. The mere fact that some other person has a right to a particular class of fish in the fishery or another person is entitled to fish at a certain time of the year does not destroy the right of exclusive fishing in any manner. (MAHAJAN J.)

(*Raja*) *Braja Sundar Deb* v. *Moni Behara*, 1951 SC 247 : 64 LW 987 : 1951 SCR 431 : 1951 SCJ 363 : 6 DLR (SC) 283 : 17 Cut LT 252 : BLR 1951 SC 209 : 30 Pat 871.

Where all that appeared in evidence was that a number of fishermen from time to time had been exercising the right of fishing with the leave and licence of some of the owners of the fishery, *held*, it was not sufficient for the acquisition of the right either by adverse possession or prescription. (MAHAJAN J.)

(*Raja*) *Braja Sundar Deb* v. *Moni Behara*, 1951 SC 247 : 30 Pat 871 : 64 LW 987 : 1951 SCR 431 : 1951 SCJ 363 : 6 DLR (SC) 283 : 17 Cut LT 252 : BLR 1951 SC 209.

AGENT

Agent and Servant.

The distinction between the relations of Principal and Agent and Master and Servant discussed.

See—*Lakshminarayan Ram Gopal and Son* v. *Government of Hyderabad*, 1954 S C 364 : 1954 SCR 393 : 1954 SCJ 395 : 1954 SCA 1027 : 25 I T R 449.

AGREEMENT

Agreement to sell—subsequent dispute.

A dispute arising 'subsequent' to the contract for sale about a particular clause in the deed, during the negotiations about the form the deed should take, cannot affect the completeness of the contract already made nor can it amount to repudiation when it is not persisted in and the plaintiff later expresses his readiness and willingness to perform the contract "agreed to". (BOSE J.)

Durga Prasad v. *Deepchand*, 1954 SC 57 : 1954 SCR 360 : 1954 SCJ 23 : 1954 SCA 934 : 9 DLRSC 77 : 1954 ALJ 73 : 67 LW 945 : 1954 (1) MLJ 60 : 1954 MWN 222 : 2BLJ 213.

AJMER LAWS REGULATION, 1877

S. 40—Rules.

Sub-rules (1) to (4) of Rule 1 travel beyond the Regulation and are *ultra vires*. The order of a District Magistrate arbitrarily prohibiting the holding of a fair is therefore bad.

1954 SC 630 Relied on. (BOSE J.)

Ganapati Singhji v. *State of Ajmer*, 1955 SCR 1065 : 1955 SC 188 : 1955 SCJ 119 : 1955 SCA 252.

APPEAL

Right of appeal.

When a statute directs that an appeal shall lie to a Court already established, then that appeal must be regulated by the practice and procedure of that Court. Also, as succinctly stated in (1913) A.C. 546, any general right of appeal from its decision likewise attaches.

74 Ind. App. 264 and 39 Mad. 617 (P.C.) referred to. (MAHAJAN J.)

National Sewing Thread Co., Ltd., v. *James Chadwick & Bros.*, 1953 SC 357 : 1953 SCR 1028 : 1953 SCJ 509 : 1953 SCA 610 : 8 DLRSC 472 : 56 Bom. LR 21 : 1953 (2) MLJ 215.

Right of—deprivation of—appellant taking benefit under pre-emption decree.

In the absence of some statutory provision or of a well recognised principle of equity no one can be deprived of his legal rights including a statutory right of appeal. That right cannot be presumed to have come to an end because the appellant has in the meantime abided by or taken advantage of something done by the opponent under the decree.

Where a defendant who has filed an appeal against a pre-emption decree passed against him withdraws the pre-emption price deposited by the plaintiff in the

Court below he cannot be held to be precluded from proceeding with the appeal for the rule in *Trimbak*'s *case* (1849) 154 ER 1176 cannot be extended to such a case where the appellant cannot be said to be taking a "benefit" under the pre-emption decree. (MUDHOLKAR J.)

Bhau Ram v. *Baij Nath Singh*, 1961 SC 1327.

Vested right.

A party to a suit has, on the cause being decided and when allowed under law, a vested right of appeal to the superior court. If the court to which an appeal lies is altogether abolished without any forum substituted in its place for the disposal of pending matters or for the lodgment of appeals, the vested right perishes. (CHANDRASEKHARA IYER J.)

Daji Singh v. *Shankar Rao*, 1955 (2) SCR 872 : 1956 SC 29 : 1956 SCJ 70 : 1956 SCA 481 : 58 Bom. LR 496.

Change in the law.

A person cannot be deprived of a vested right of appeal by a subsequent change in the law unless the later enactment provides expressly or by necessary implication for retrospective effect being given.

(1905) A C 369 applied. (CHANDRA SEKHARA IYER J.)

Ganapati Hiralal v. *Aggarwal Chamber of Commerce*, 1952 SC 409 : 1953 SCR 752 : 1952 SCJ 564: 1953 SCA 1 : 7 DLR SC 491 : 66 LW 1.

A vested right of appeal cannot be taken away except by express enactment or by necessary intendment. A provision which is calculated to deprive the appellant of the unfettered right of appeal cannot be regarded as a mere alteration in procedure.

1931 Cal. 100 and 56 Cal. 512 (F.B.) approved. (S. R. DAS J.)

M/s. Hossein Kasam Dada (India) Ltd. v. *State of M.P.*, 1953 SCR 987 : 1953 SC 221.

The argument that under the amended law the appellate authority has no option or jurisdiction to admit the appeal unless a new condition is complied with overlooks the fact of existence of the old law for the purpose of supporting the pre-existing right of appeal and really amounts to begging the question. (S. R. DAS J.)

M/s. Hoosein Kasam Dada (India) Ltd. v. *State of Madhya Pradesh*, 1953 SC 221 : 1953 SCR 987 : 1953 SCJ 276 : 1953 SCA 672 : 8 DLR SC 443 : 1953 I T C 114.

Nature of the right.

(*i*) The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding ;

(*ii*) The right of appeal is not a mere matter of procedure but is a substantive right ;

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit ;

(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the *lis* commences and although it may be actually exercised when the

adverse judgment is pronounced such right is to be governed by the law prevailing at the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal ;

(v) This vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary intendment and not otherwise. (S. R. DAS C.J.)

Garikapathi Veerayya v. *Subbiah Chowdhury*, 1957 SCR 488 : 1957 SC 540 : 1957 SCA 495 : 1957 SCJ 439 : 1957 (2) MLJ 1 : 1957 (2) ANWR 1 : 1957 SCC 399.

Commencement of Lis.

Whenever there is a proposition by one party and an opposition to that proposition by another party, a *lis* arises. Conceding without deciding it, that in fiscal matters when an assessee files a "return" a *lis* may not immediately arise, surely a controversy does arise when the assessing authority is not satisfied as to the correctness of the return and calls for evidence. (S. R. DAS J.)

M/s. Hoosein Kasam Dada (India) Ltd. v. *State of Madhya Pradesh*, 195 SC 221 : 1953 SCR 987 : 1953 SCJ 276 : 1953 SCA 672 : 8 DLR SC 443 : 1953 ITC 114.

ARBITRATION ACT, 1940.

S. 2 (a) ["arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;]

Signature of parties—Not Essential.

To constitute an arbitration agreement in writing it is not necessary that it should be signed by the parties ; it is sufficient if the terms are reduced to writing and the agreement of the parties thereto is established.

(VENKATARAMA IYER J.)

Jugal Kishore v. *Gool Bai Hormusji*, 1955 (2) SCR 857 : 1955 SC 812 : 1956 SCA 499 : 58 Bom LR 486 : 1956 SCJ 64.

Construction of the agreement.

The words "interpretation or application of the contract" frequently used in arbitration agreements generally cover disputes between the parties in regard to the construction of the relevant terms of the contract as well as their effect and unless the context compels a contrary construction, a dispute in regard to the working of the contract would generally fall within the clause in question.

(GAJENDRAGADKAR J.)

Printers (Mysore) Private Ltd. v. *Pothan Joseph*, 1960 SC 1156 : 1960 (3) SCR 713 : 1961 Pat LR 6.

A contract contained an arbitration clause providing for reference "all matters, questions, disputes, differences and/or claims, arising out of, and/or concerning, and/or in connection with, and/or in consequence of or relating to this contract whether or not obligations of either or both parties under this contract be subsisting....." The question was whether a party to the contract was a party in his own right as principal or was only a broker and it turned upon the true interpretation of the contract. *Held*,

Where a party has to have recourse to the contract to establish his case, it will be a dispute under the contract and therefore the dispute in question was one under or arising out of or concerning the contract and as such fell within the arbitration clause. (FAZL ALI & PATANJALI SASTRI JJ.)

A. M. Mair & Co. v. *Gordhandas Sugarmull*, 1950 SCR 792 : 1951 SC 9 : 1951 SCJ 1 : BLR 1951 SC 3 : 6 DLR (SC) 84 : 1951 ALJ 124 : 1951 MWN 284 : 64 LW 347 : 1951 CWN 155 : 87 CLJ 123 : 2 Raj LW 190.

Jurisdiction of Court.

Once the dispute is found to be within the scope of the arbitration clause, it is no part of the province of the Court to enter into the merits of the dispute.

(*ibid.*)

S. 12 (2) & S. 32—interim divisions by arbitrators.

A partition dispute between members of a Hindu joint family was referred to arbitration and the arbitrators divided some of the properties from time to time the parties accepted these divisions which were reduced to writing and some other properties still remained to be divided. Thereafter a petition for an order revoking the reference was filed and the reference was cancelled. In a suit brought for partition it was contended by the plaintiff that the entire properties should be divided again on the grounds that (1) the cancellation of the reference had the effect of vacating the divisions already made, (2) section 32 barred the setting up of the awards made by the arbitrators in defence as they were not filed, into Court under the provisions of the Act and (3) in any event the awards, not being registered, were inadmissible in evidence to prove the interim divisions.

Held, (negativing the contentions):

(1) The arbitrators having with the consent of the parties proceeded to divide the properties in stages, each decision must be regarded as final with regard to the property divided thereby although if their decisions had not been accepted by the parties, with the revocation of the reference all proceedings which they had adopted might have fallen through.

(2) Even assuming that the records of the divisions made by the arbitrators were awards strictly so called, what was set up in defence was not the awards made by the arbitrators but the partition of the property by agreement after accepting the method of partition suggested by the arbitrators and section 32 did not bar such a plea; and

(3) The records made by the arbitrators were documents which merely acknowledged partitions already made and accepted by the parties and were not by law required to be registered.

(SHAH J.)

Kashinathsa Y. Kabadi v. *Narasingsa B. Kabadi*, 1961 SC 1077.

S. 14 (2).[.....The arbitrators or umpire shall, at the request of any party to the arbitration agreement.....or if so directed by the Court.....cause the award or a signed copy of it..... to be filed in Court.....]

Actual Filing of the award—Not Essential.

The actual filing of the award by the umpire is not essential and there is sufficient compliance if the umpire sends the award by post pursuant to the notice issued by the Court to him. (JAGANNADHA DAS J.)

Kumba Mawji v. *Dominion of India*, 1953 SC 313 : 1953 SCR 878 : 1953 SCJ 436 : 1954 SCA 866 : 8 DLR SC 359 : 1953 (1) MLJ 841 : 1953 MWN 600.

Authority to file the award.

The section clearly implies that when the award or a signed copy of it is in fact filed into Court by a party, he should have the authority of the umpire for

doing so. That authority has to be specifically alleged and proved. The mere handing over of the award by the umpire to the parties does not necessarily imply his authority to file the same into Court on his behalf. (JAGANNADHA DAS J.)

Kumba Maaji v. *Dominion of India,* 1953 SC 313 : 1953 SCR 878 : 1953 SCJ 436 : 1954 SCA 866 : 8 DLR SC 359 : 1953 (1) MLJ 841 : 1952 MWN 600.

S. 16 (1) [The Court may.....remit the award.....to the arbitrators.... ....for reconsideration.....:—

.....

(*c*) Where an objection to the legality of the award is apparent upon the face of it.]

Error on the face of the record.

An award discloses an error on the face of it, if it contains either in itself or in some paper intended to be incorporated in it, some legal proposition which on the face of it and without more can be said to be erroneous. (SARKAR J.)

Dr. S. Dutt v. *University of Delhi,* 1958 SC 1050 : 1958 SCA 1098 : 61 Pun LR 1 : 1959 SCJ 78.

Award covering new contract.

If the parties choose to add a fresh contract in addition to or in substitution of the old contract the arbitration clause contained in the old contract cannot cover the new contract. In such a case if there is an award covering the new contract also, the award will be defective due to an error apparent on the face of the record. (BOSE J.)

Thawardas v. *Union of India,* 1955 (2) SCR 48 : 1955 SC 468 : 1955 SCA 862 : 1955 SCJ 445 : 1955 (2) MLJ 23 : 57 Pun. LR 369 : 34 Pat. 359 : 1955 MWN 782.

Allowing of interest.

Where the arbitrator allows interest on the claim referred to arbitration because he thinks the demand is reasonable, but the case is one where under law no interest is allowable the award is vitiated by an error in law. (BOSE J.)

Thawardas v. *Union of India,* (*ibid.*).

Error of law.

S. 16(1) (c) covers cases in which an error of law appears on the face of the award. But in determining what such an error is, a distinction must be drawn between cases in which a question of law is specifically referred to and those in which a decision on a question of law is incidentally material in order to decide the question actually referred.

An arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. If he does, he can be set right by the Courts provided his error appears on the face of the record. The single exception to this is when the parties choose specifically to refer a question of law as a separate and distinct matter. If no specific question of law is referred, the decision of the arbitrator on that is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. (BOSE J.)

Thawardas v. *Union of India,* (*ibid.*).

No reference of specific question of law—Jurisdiction of Court.

A reference requires the assent of "both" sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the Court under Sec. 20 of the Act and the recalcitrant party can then be compelled to submit the matter under sub-section (4). In the absence of either agreement by 'both sides' about the terms of reference, or an order of the Court under Section 20 (4) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction.

Therefore, when a question of law is the point at issue, unless 'both' sides specifically agree to refer it and agree to be bound by the arbitrator's decision, the jurisdiction of the Court to set an arbitration right when the error is apparent on the face of the award is not ousted. (BOSE J.)

Thawardas v. *Union of India* (*ibid*).

S—20. Scope.

A contract of sale was entered into subject to the bye-laws of the East India Cotton Association Ltd., Bombay (including bye-law 38A providing for arbitration). On an application to file the agreement under S. 20 it was contended that by the application of the bye-laws, the Court was left no powers under S. 20 as the Court will have to do nothing more with it after filing the agreement and therefore the application was not maintainable.

Held (negativing the contention); there was no impediment to action being taken under S 20 (4) and therefore, the application was maintainable. (HIDAYUTALLAH J.)

Dhanrajamal Gobindram v. *Shamji Kalidas & Co*, 1961 SC 1285.

S. 21 [Where in any suit all the parties....agree that any matter in difference .....in the suit shall be referred.....they may at any time before judgment is pronounced apply.....to the Court for an order of reference.]

"Any matter"—immovable property outside India.

Courts in India have no jurisdiction to determine questions of title to immovable property, situate in a foreign country or to direct a division thereof. Therefore the Court has no jurisdiction to refer such a question for determination of the arbitrators. (GAJENDRAGADKAR J.)

Nachiappa v. *Subramaniam*, 1960 (2) SCR 209 : 1960 SC 307 : 1960 SCJ 416 : 1960 (1) SCA 655 : 1960 (1) MLJ 101 : 1960 An WR 101.

"at any time before judgment is pronounced".

The expression in S. 21 "at any time before judgment is pronounced" is only intended to show the limit of time beyond which a reference cannot be made and that limit is reached when a final judgment is pronounced. When an interlocutory judgment is passed or a preliminary decree is made in respect of some matters in dispute, it cannot be contended that thereafter only such matters of difference as are not covered by the interlocutory judgment, can be referred to arbitration. Therefore, so long as the final judgment is not pronounced, any matter—some or all the matters—in difference between the parties can be referred to provided the parties are agreed about it. (GAJENDRAGADKAR J.)

Nachiappa v. *Subramaniam*, (*ibid*).

"Court"—whether includes appellate Court.

"Court" in S. 21 includes the appellate Court and "suit" includes appellate proceedings. The appellate Court therefore might, with the consent of parties refer to arbitration matters in dispute between the parties.

3 Mad 78 approved. 12 Ben LR 266 and (1946) 2 Cal. 492 overruled.

If a suit is pending before the trial court and final judgment has not been pronounced it may make an order of reference under S 21. Similarly when a final judgment has been pronounced and there has been no appeal against it, the matter has become concluded and S. 121 does not apply. Also if a decree determining a suit has been drawn up by the trial Court and it is taken on appeal then it is the appellate Court, during the pendency of the appeal, that is competent to act under S. 21 and not the trial court.

When a preliminary decree has been passed and an appeal against it is pending in the appellate Court and necessary proceedings pursuant to the preliminary decree are pending before the trial court, both courts are seized of the matters in dispute in part and it would be open to either court to make an order of reference in respect of all the matters in dispute between the parties. (GAJENDRAGADKAR J.)

Nachiappa v. *Subramaniam*, (*ibid*).

S. 30 [An award shall not be set aside except on....the following grounds....:—
(a) that an arbitrator.... has misconducted himself or the proceedings; .....
(c) that the award has been improperly procured or is otherwise invalid.]

Arbitrator exceeding his authority.

No doubt an agreement for reference to arbitration should be liberally construed by the Court so as to lean in favour of upholding the award given by arbitrators, but that is no ground for sustaining the award where the arbitrators have clearly misdirected themselves and have exceeded the scope of their authority. (GHULAM HASAN J.)

Gobardhan Das v. *Lachhmi Ram*, 1954 SC 689.

Composite award under several valid and void contracts.

Disputes under several contracts each containing an arbitration clause were referred to arbitration and a composite award was made in respect of all the disputes. It turned out that one of the contracts was void and the arbitration clause in it was therefore a nullity.

Held, as the award was one and not separable in respect of different disputes covered by it some of which may have been legally and validly referred, the whole award was liable to be set aside. (SARKAR J.)

Basantlal Banarsilal v. *Bansilal Dagdulal*, 1961 SC 823.

Reference on specific question of law.

If the reference is of a specific question of law even if the award is erroneous, the decision being of arbitrators selected by the parties to adjudicate upon those questions, the award will bind them. If the reference is not of a specific question of law but only a general reference, the award can be set aside if it is erroenous on the face of it. (SHAH J.)

Alopi Parshad v. *Union of India*, 1960 SCJ 763 : 1960 SC 588 : 1960 (2) SCR 793 : 1960 (2) SCA 45 : (1960) 2 Punj 85 : 1960 (2) MLJ 46 : 1960 (2) An WR 46.

Legal misconduct.

In a suit for maintenance by a Hindu widow against her husband's brother and others, the defendants contested the claim on the ground that sufficient arrangement for her maintenance and residence had been made by her husband's will and that she accordingly had been in possession of some property and a petition was filed by the parties agreeing to the dispute being referred to arbitration. The petition did not give any special powers to the arbitrator and the pleadings were sent to the arbitrator as prayed in the petition. The arbitrator examined each party in the absence of the other, perused the alleged will and published an award.

Held, the arbitrator by examining the defendant in the absence of the plaintiff and by perusing the alleged will without giving an opportunity to the plaintiff to have her say in the matter was guilty of legal misconduct sufficient to vitiate the award.

1950 Mad. 16 Reversed. (BHAGWATI J.)

Payyavula Vengamma v. *Payyavula Kesanna*, 1953 SC 21 : 1953 SCR 119 : 1952 SCJ 630 : 1953 SCA 16 : 8 DLR SC 33 : 1953 ALJ 73 1953 (1) MLJ 97 : 66 LW 180 : 1 BLJ 61.

S. 31 (4)—"in any reference."

The phrase "in any reference" means "in the matter of a reference" and is therefore comprehensive enough to cover also an application first made after the arbitration is completed and a final award is made, and that is the correct construction thereof in this context. (JAGANNADHA DAS J.)

Kumba Mawji v. *Dominion of India*, 1953 SC 313 : 1953 SCR 878 : 1953 SCJ 436 : 1954 SCA 866 : 8 DLR SC 359 : 1953 (1) MLJ 841 : 1953 MWN 600.

S. 33 [Any party to an arbitration agreement.....desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question.]

Scope of enquiry.

In the case of a contract containing various other matters relating to the contract besides an arbitration clause, S. 33 is concerned only with the arbitration clause and not the other terms of the contract which do not arise for consideration in an application under the section. (WANCHOO J.)

Shiva Jute Baling Ltd. v. *Hindley and Co.*, 1960 (1) SCR 569 : 1959 SC 1357 : 1960 (2) SCA 500 : 1960 SCJ 35 : 1960 (1) MLJ 1 : 1960 (1) An WR 1.

Existence or validity or effect of arbitration agreement.

Where the existence of the contract and the arbitration clause are admitted but the contention is that the arbitration clause has ceased to be applicable, it cannot be sustained without having recourse to the agreement. The test is whether recourse to the contract by which the parties are bound is necessary for determining the matter in dispute between them. If so, the dispute will fall within the arbitration clause.

1925 A.C. 619 Ref. to. 1950 SCR 792 followed.

However if the dispute is whether the contract was ever entered into at all or not, or whether the contract is *ab initio* void (e.g. as being illegal, etc.) the arbitration clause cannot operate, for in this view, the arbitration clause itself is non-existent or void.

1942-1 All E.R. 337 Relied on.

Where an insurance policy containing an arbitration clause provided that in case no reference is made within 12 months after the insurer disclaimed liability to the insured, the claim shall be deemed to have been abandoned and the question was whether the reference was made within 12 months after the disclaimer,

Held, it fell within the jurisdiction of the arbitrator. (FAZL ALI J.)

Ruby General Insurance Co. v. *Pearey Lal Kumar*, 1952 SC 119 : 1952 SCR 501 : 1952 SCJ 156 : 1952 (1) MLJ 741 : BLR 1952 SC 153 : 1952 MWN 455 : 65 LW 770 : 7 DLR (SC) 225 : 1952 SCA 377.

Award during pendency of application.

When during the pendency of an application under S. 33, the arbitrator filed an award and no objections were filed to it, and no application was made in the courts below to amend the application under S. 33 by adding a prayer for a declaration that the award was invalid ; *Held* : the Supreme Court could not be asked to go into the validity of the award by widening the scope of the original petition. (FAZL ALI J.)

Ruby General Insurance Co. v. *Pearey Lal Kumar*, (*ibid*).

S. 34 [Where any party to an arbitration agreement.....commences any legal proceedings against any other party....in respect of any matter agreed to be referred, any party to such legal proceedings may,.....before filing a written statement or taking any other steps....apply to the judicial authority before which the proceedings are pending, to stay the proceedings and, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with.... agreement, and that the applicant was,....when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.]

Conditions for stay.

In order that a stay may be granted under this section, it is necessary that the following conditions should be fulfilled :

(1) The proceeding must have been commenced by a party to an arbitration agreement against any other party to the agreement ;

(2) the legal proceeding which is sought to be stayed must be in respect of a matter agreed to be referred ;

(3) the applicant for stay must be a party to the legal proceeding and he must have taken no step in the proceeding after appearance ;

(4) the applicant must satisfy the court that he is, and also was, at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration ; and

(5) the court must be satisfied that there is no sufficient reason why the matter should not be referred to an arbitration in accordance with the arbitration agreement.

The first and essential pre-requisite to making an order of stay under Sec. 34 is, that there is a binding arbitration agreement between the parties to the suit. The question whether the dispute in the suit falls within the arbitration clause really presupposes that there is such an agreement and involves consideration of two matters namely:-(1) what is the dispute in the suit and (2) what disputes the arbitration clause covers ? (MUKHERJEA J.)

Anderson Wright Ltd. v. *Moran & Co.*, 1955 SCR 862 : 1955 SC 53 : 1955 MWN 107 : 1955 Nag. LJ 116 : 1955 SCJ 200 : 1955 (1) MLJ 113 : 95 CLJ 211.

When to be refused.

The legal proceeding which is sought to be stayed must be in respect of a matter which the parties have agreed to refer, and which comes within the ambit of the arbitration agreement. Where, however, a suit is commenced as to a matter lying outside the submission, the court is bound to refuse stay. (MAHAJAN J.)

Gaya Electric Supply Co. v. *State of Bihar*, 1953 SC 182 : 1953 SCR 572 : 1953 SCJ 217 : 1953 SCA 382 : 8 DLR SC 223 : 1 BLJ 308 : 91 CLJ 137 : 1953 (1) MLJ 605 : 66 LW 532 : 32 Pat 364.

Scope of enquiry.

The function of the Court exercising jurisdiction under S. 34 is a very limited one and the Court cannot in proceedings under this section go into the validity of the plaintiff's contention in the suit. The only point to be decided is whether the claim brought, whether it is good, bad or indifferent, comes within the submission to arbitration.

1951 Patna 157 disapproved and reversed. (MAHAJAN J.)

Gaya Electric Supply Co. v. *State of Bihar* (*ibid*).

Jurisdiction to decide existence of arbitration agreement.

Where on an application for stay, an issue is raised as to the formation, existence or validity of the contract containing the arbitration clause, the Court is not bound to refuse stay but may, in its discretion, decide the issue as to the existence or validity of the arbitration agreement even though it may involve incidentally a decision as to the validity or existence of the parent contract. (MUKHERJEA J.)

Anderson Wright Ltd. v. *Moran and Co.*, 1955 SCR 862 : 1955 S C 53 : 1955 SCJ 200 : 1955 MWN 107 (2) : 95 Cal. LJ 211 : 1955 Nag LJ 116 : 1955 (1) MLJ 113.

Discretionary power—Exercise—Principles.

The power conferred upon courts to stay legal proceedings where there is an arbitration agreement is a discretionary power, and a party to an arbitration agreement against whom proceedings have been commenced cannot claim stay as a matter of right. But the discretionary power must be properly and judicially exercised. It is inexpedient to lay down any inflexible rule, which should govern the exercise of the said discretion.

In exercising the discretion, the Court should not refuse stay merely because one of the parties to the arbitration agreement is unwilling to go before an arbitrator and in effect wants to resile from the arbitration agreement, or because arbitration proceedings may cause unnecessary delay as a result of embittered feelings between the parties, or because some question of law would arise in the solution of the dispute.

On the other hand, if fraud or dishonesty is alleged against a party, it may be open to him to claim an opportunity to vindicate his character in court rather than before the domestic tribunal. Long delay in making the application for the stay, which may be properly attributed to the parties having abandoned the arbitration agreement, may be considered by the Court as a relevant fact. Similarly if complicated questions of law or constitutional arbitrator, issues arise, which it would be inexpedient to leave to the decision of the the court may in a proper case refuse stay on that ground. (GAJENDRAGADKAR J.)

Printers (Mysore) Private Ltd. v. *Pothan Joseph*, 1960 SC 1156 : 1960 (3) SCR 713 : 1961 Pat I.R 6.

Comprehensive arbitration agreement—Avoidance of the contract—Dispute is referable.

The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (a) what the dispute is, and (b) what disputes the arbitration clause covers. If the arbitration agreement is broad and comprehensive and embraces any dispute between the parties "in respect of" the agreement or any provision in the agreement, or anything arising out of it, and one of the parties seeks to avoid the contract, the dispute is referable to arbitration, if the avoidance of the contract arises out of the terms of the contract itself. Where, however, a party seeks to avoid the contract for reasons *de hors* the contract, the arbitration clause cannot be resorted to as it goes along with the other terms of the contract. In other words, a party cannot rely on a term of the contract to repudiate it and still say, the arbitration clause should not apply. If he relies upon a contract, he must rely on it for all purposes. Where, however, the arbitration clause is not so comprehensive this proposition does not hold good.

(1942) A.C 356 referred to.

In an agreement by the Government to take over an electric supply company, it was agreed to refer to arbitration any dispute over the valuation of the undertaking to be arrived at by the Government and that by the Company. The company filed a suit praying for a declaration that the undertaking belonged to them and for damages on the allegation that the Government had neglected to make its valuation and thereby committed breach of contract. *Held*, the suit claim was not within the scope of the submission, as the arbitrator had not been conferred the power to pronounce on the issue, whether the Government committed a breach by not making a valuation within the time specified.

1951 Patna 157 Reversed. (MAHAJAN J.)

Gaya Electric Supply Co. v. *State of Bihar,* 1953 SC 182 . 1953 SCR 572 : 1953 SCJ 217 : 1953 SCA 382 : 8 DLR SC 223 : 1 BLJ 308 : 91 CLJ 137 : 1953 (1) MLJ 605 : 66 LW 532 : 32 Pat 364.

S. 35 and S. 33—Award commenced before but completed after the institution of proceedings under S. 33.

An arbitratior can continue the proceedings and proceed to make an award on the reference unless the whole of the subject matter of the reference is covered by legal proceeding instituted.

Assuming that proceedings under S. 33 to adjudicate on the existence and validity of the arbitration agreement are "legal proceedings" mentioned in S. 35, these questions not being within the competence of the arbitrators, there can be no identity of subject matter under reference to arbitration and the subject matter of the application under S. 33. Hence, an award made on a reference commenced before but completed after the institution of proceedings by one party under S. 33 and after service of notice, cannot be assailed as violating section 35.

(1955) 1 Cal. 29 affirmed. (WANCHOO J.)

Shiva Jute Baling Ltd. v. *Hindley and Co.,* 1960 (1) SCR 569 : 1959 SC 1357 : 1960 (2) SCA 500 : 1960 SCJ 35 : 1960 (1) MLJ 1 : 1960 (1) An WR 1.

Schedule I, R. 3—Computation of limitation.

The legal position regarding the computation of the period of limitation for making an award may be formulated thus:- A notice to act may be given before or after the arbitrators enter upon the reference. If the notice to act is given before

they enter upon the reference, the 4 months would be computed from the date they enter upon the reference. If a party gives notice to act within 4 months after the arbitrators enter upon the reference, the arbitrators can make an award within 4 months from the date of such notice and in that event after the expiry of the said 4 months, the arbitrators become *functus officio*, unless the period is extended by Court under Section 28 ; such period may also be extended by the Court, though the award has been factually made.

Where a notice was given long after the expiry of 4 months from the date when the arbitrators entered on the reference, *held*, the award made within 4 months after such notice was not valid and the proper course should have been to apply to the Court for extension of time under Section 28. (SUBBA RAO J.)

Harishankerlal v. *Shambu Nath*, 1961 A. L. J. 748.

ASSAM LAND AND REVENUE REGULATION, 1886.

SS. 9, 3 (g) and 8 (1) (a).

To Bardeuries (Temple officials) holding lands who fall under S. 8 (a) and become landholders under S. 3 (g), S. 9 will apply and therefore their rights in the lands in their occupation are statutorily recognised to be permanent, heritable and transferable. (GAJENDRAGADKAR J.)

Jibon Chandra Sharma v. *Anandi Ram Kalita*. 1961 SC 1309.

Ss. 16 and 155—Assam Fisheries Rules, R. 12.

Rule 12 of the Assam Fisheries Rules, specifically empowers the State Government to settle the fishery rights otherwise than by sale and there is no conflict at all between the rule and Section 16.

(1955) Assam 510 overruled. (BHAGWATI J.)

Ganga Ram Das v. *Tezpur Kaibarta Co-operative Fishery Society*, 1957 SC 377 : 1957 SCR 479 : 1957 SCA 208.

Rules 190A, 190—settlement by Government.

Under the Act and the rules the Deputy Commissioner is the only authority competent to settle the fisheries, subject of course to sanction.

The State Government, purporting to act under R. 190-A, directed the Deputy Commissioner to put a fishery to auction and submit the bid list with his recommendation to the Government and upon receipt thereof sanctioned a settlement with the person recommended and after communication of the sanction to that person cancelled the settlement and resettled it with another person. On appeal to the High Court by the aggrieved prior settlee it was contended by the State Government that the settlement was not by the Deputy Commissioner but by the State Government and therefore no appeal lay to the High Court.

Held, (negativing the contention),

The Government which had "sanctioned" the settlement, could accord sanction only to the act of another and therefore the act of cancellation and resettlement were the acts of the Deputy Commissioner however much he may have acted under the direction and orders of a third party, viz., the Government and therefore High Court had jurisdiction under R. 190. (BOSE J.)

State of Assam v. *Keshab Prasad Singh*, 1953 SC 309 : 1953 SCJ 429 : 1954 SCA 758 : 1953 SCR 865.

ASSAM LAND REVENUE TRIBUNAL (TRANSFER OF POWER) ACT, 1948.

S. 3 (3)—Validity.

S. 3 (3) is not bad either as repugnant to S. 296 (2) of the Government of India Act, 1935. or as being an excessive delegation of Legislative power t the Provincial Government.

1956 Assam 142 Reversed. (S. R. DAS C.J.)

State of Assam v. *Sristikar Dowerah,* 1957 SCR 295 : 1957 SC 414 : 1957 SCA 697 : 1957 SCJ 345.

"appointed".

The word "appointed" does not necessarily mean already appointed. It may also mean to be appointed at any future time. When a person is appointed by the Provincial Government after the date of the Act he may immediately thereafter be well described as a person appointed by the Provincial Government. (S. R. DAS C.J.)

State of Assam v. *Sristikar Dowerah, (ibid).*

The notification issued on 5-7-1955 appointing as the appellate authority, the Commissioner of Hills Division and Appeal is valid.

1956 Assam 142 Reversed. (S. R. DAS C. J.)

State of Assam v. *Sristikar Dowerah, (ibid).*

ASSAM TAXATION (ON GOODS CARRIED BY ROADS OR INLAND WATERWAYS) ACT, 1954—validity.

The object of the Act is to collect taxes on goods solely on the ground that they are carried by road or by inland waterways within the area of the State. So the Act has put a restriction on the freedom of trade, and it has not complied with the provisions of Art. 304 (b), therefore it must be declared to be void.

1955 Assam 249 Reversed. (GAJENDRAGADKAR J)

Atiabari Tea Co Ltd. v. *State of Assam,* 1961 SC 232.

BANKER AND CUSTOMER

In Banking transactions, the following rules are now well settled :—

(1) the obligation of a bank to pay the cheques of a customer rests primarily on the branch at which he keeps his account and the bank can rightly refuse to cash a cheque at any other branch.

(2) A customer must make a demand for payment at the branch where his current account is kept before he can have a cause of action against the bank.

The rule is the same whether the account is a current account or whether it is a case of deposit. (BOSE J.)

Delhi Cloth & Gen. Mills Co. v. *Harnam Singh,* 1955 (2) SCR 402: 1955 SC 590: 1955 SCJ 645 : 1955 (2) MLJ 141 : 57 Pun. LR 313 : 1955 An WR 395.

BANKING COMPANIES ACT, 1949 (AS AMENDED IN 1953)

S. 45B & Displaced Persons (Debt Adjustment) Act, 1951.

The jurisdiction vested in the High Court by S. 45 B cannot be said to be overridden or displaced by Displaced Persons (Debt Adjustment) Act, 1951, in so far as they relate to displaced creditors. (JAGANNADHA DAS J.)

Ram Narain v. *Simla Banking & Industrial Co. Ltd*, 1956 SCR 603 1956 SC 614 : 1956 SCJ 579 : 1956 SCA 893 : 26 Comp. Cas 280 : (1956) Punj 1321 : 59 Pun LR 1.

Having regard to the wide and comprehensive language of sections 45A & 45B, it is clear that a proceeding to execute a decree obtained by a displaced creditor from the Tribunal under the Displaced Persons (Debt Adjustment) Act against a Bank and all other incidental matters arising therefrom, such as attachment, are matters within the exclusive jurisdiction of the Court that has directed winding up proceedings of the Bank. (JAGANNADHA DAS J.)

Ram Narain v. *Simla Industrial and Banking Co. Ltd.*, (*ibid*).

Procedure.

In the absence of any specific provision in the Act itself and in the absence of any rules framed by the High Court, the procedure under the section must be taken to be one left to the judgment and discretion of the Court, having regard to the nature of the claim and of the questions therein involved. Obviously the normal procedure contemplated by the section must be taken to be a summary proceeding by way of an application.

55 CWN 400 overruled. (JAGANNADHA DAS J.)

Ram Narain v. *Simla Industrial and Banking Co. Ltd.*, (*ibid*).

S. 45C—Court.

A civil court which has been specified as a Tribunal under the Displaced Persons (Debt Adjustment) Act is a court when it executes the decree within the meaning of S. 45C and therefore S. 45C applies to a proceeding pending before the tribunal. (JAGANNADHA DAS J.)

Ram Narain v. *Simla Industrial and Banking Co. Ltd.*, (*ibid*).

BAR COUNCILS ACT, 1926

S. 9(1) Proviso—Validity.

The proviso to section 9(1) is not void as being an unreasonable restriction upon the fundamental right guaranteed under Art. 19 (1) (g) of the Constitution. (MUKHERJEA J.)

Babul Chandra Mitra v. *The Chief Justice and Judges of the Patna H.C.*, 1954 SC 524 : 1954 SCA 395 : (1954) Pat. 553.

Exercise of discretion.

The matter rests entirely upon the exercise of a discretion by the High Court. As a matter of fact, it is to be normally expected that the High Court would give notice to the person whose application for enrolment is before it for consideration and give him an opportunity to explain anything that might appear against him before it rejects his application. (MUKHERJEA J.)

Babul Chandra Mitra v. *Chief Justice* (*Ibid.*)

S. 10 (1) [The High Court may, in the manner hereinafter provided, reprimand, suspend or remove from practice any advocate of the High Court whom it finds guilty of professional or other misconduct.

.....]

Professional or other misconduct.

The Indian Legislature by using the words "professional or other misconduct' in S 10 intended to confer on the court disciplinary jurisdiction to take action in all cases of misconduct whether in a professional or other capacity leaving it to the discretion of the court to take action only in suitable cases. (S. R. DAS J.)

D, An Advocate of the Supreme Court, In re, 1955 (2) SCR 1006 : 1956 SC 102 : 1956 SCA 507 : 1956 SCJ 124 : 1956 Cr. LJ 280 : 1956 (1) MLJ 85 : 58 Bom LR 510 : 69 LW 915.

Professional misconduct.

An advocate got a false stay order written by a clerk of the Court by improper means and thereby managed to take an illegal and undue advantage for his client.

Held, this was a case of a very serious misconduct and (taken in the light of the fact that he had been previously suspended from practice for a short period on a charge of misappropriating client's money) such a reprehensible lapse must be taken a very serious view of and therefore the order of the High Court directing his removal from the roll of advocates was fully justified.

(GAJENDRAGADKAR J.)

Manaklal v. *Dr. Premchand,* 1957 SCR 575 : 1957 S.C. 425 : 1957 SCJ 359: 1957 (1) MLJ 254 : 1957 SCA 719.

An advocate was charged with (1) having applied for and obtained copies of statements made under S. 162 Cr. P.C. by witnesses who were cited but not examined at the trial, by misleading the Court, (2) having put improper questions to the investigating Inspector in cross-examination in that case and (3) having put scandalous and indecent questions to the prosecutrix in that rape case, and the High Court, holding charges (1) and (2) proved, characterised the first action as a sharp practice unworthy of a member of the Bar and that the question to the Inspector was irrelevant and improper and suspended the advocate from practice for a period of six months. On appeal,

Held, (1) the Court had failed to exercise its jurisdiction in not refusing to grant the copy applied for and that the advocate's conduct cannot be called a piece of sharp practice justifying suspension ; (2) it was not possible to say that the question which was intended to shake the witness's credit was improper ; and (3) the conduct of the advocate in not exercising proper discretion in putting certain questions to the prosecutrix was to be disapproved,

and that the issuing of a warning to him would serve to make him more careful in future. (GHULAM HASAN J.)

Shiv Narain Jafa v. *Judges of the Allahabad High Court,* 1953 SC 368 : 1953 SCJ 529 : 1953 SCA 636 : 8 DLR SC 403 : 1953 (2) MLJ 238 : 54 Cr. LJ 1459.

Circumstantial evidence.

Where the evidence against an advocate who is charged with professional misconduct is substantially circumstantial, a finding of misconduct cannot be made on such circumstantial evidence unless the evidence is wholly inconsistent with his innocence and leads irresistibly to the inference of his guilt.

(GAJENDRAGADKAR J.)

Manaklal v. *Dr. Premchand,* 1957 SCR 575 : 1957 SC 425 : 1957 SCA 719 : 1957 SCJ 359 : 1957 (1) MLJ 254.

Examination by Supreme Court.

It is difficult to accept the argument that a concurrent finding of fact as to misconduct of an advocate by both the Tribunal of the Bar Council and the High Court should be re-examined on merits by the Supreme Court in an appeal by special leave. (GAJENDRAGADKAR J.)

Manaklal v. *Dr. Premchand,* (*ibid.*)

S. 10(2)—Order of reference—whether should be written.

It is necessary that there should be some record of the order on the files bu the order itself need not be a written one. It can be an oral order given to a proper officer of the Court. (BOSE J.

G, Senior Advocate of the Supreme Court v. *Chief Justice and Judges of High Court of Bombay,* 1954 SC 560 : 1955 (1) SCR 501 : 1954 SCJ 630 : 19 SCA 864 : 1954 Andh. LJSC 89 : 1954 ALJ 56 : 56 Bom. LR 1224 : 1954 (2) 205 : 67 LW 771 : 1954 MWN 816 : 2 BLJ 481 : 55 Cr. LJ 1417.

S. 12—Parties to appeal.

In an appeal arising out of a proceeding under Sec. 12, the appropriate parties are the advocate concerned, the complainant, the Bar Council or the Secretary thereof and the Advocate General of the State.

It is wholly wrong and inappropriate for the appellant to make the Judges of the High Court respondents in the appeal. (S. R. DAS J.)

Bhataraju Nageshwara Rao v. *Hon'ble Judges of the High Court, Madras,* 1955 SCR 1055 : 1955 SC 223 : 1955 SCA 346 : 1955 SCJ 192 : 1955 (1) MLJ 105: 1955 MWN 313.

BENAMI TRANSACTION

Two classes of benami transactions.

The word benami is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one sense it signifies a transaction which is real, as for example when A sells properties to B but the sale deed mentions X as the purchaser. Here the sale itself is genuine but the real purchaser is B, X being his benamidar. This is the class of transactions which is usually termed as Benami.

But the word "Benami" is a'so occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example when A purports to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between the two classes of transactions is that whereas there is an operative transfer in the former, in the latter there is none such, the transferor continuing to retain the title.

It is only in the former class of cases, it would be necessary, when a dispute arises, to enquire into the question as to who paid the consideration for the transfer. In the latter, the point for decision would be not who paid the consideration, but whether any consideration was paid. (VENKATARAMA IYER J.)

Shree Meenakshi Mills Ltd. v. *Commissioner of Income-tax,* 1956 SCR 691 : 1957 SC 49 : 1957 SCJ 1 ; 1956 SCA 1139 : 1957 (1) MLJ 1 : 31 ITR 28 : 1957 (1) An WR 1,

Contemplated fraud.

Where the plaintiff has established the benami nature of the transaction, he is entitled to succeed, if the contemplated fraud was not perpetrated, for public policy demands that in such a case the defendant cannot be allowed to perpetrate a new fraud. (HIDAYATULLAH J.)

Kedar Nath v. *Prahlad Rai*, 1960 (1) SCR 861 : 1960 S.C. 213 : 1960 SCJ 1072 : 1960 BLJR 260.

In pari delicto.

Where both parties do not show that there was any conspiracy to defraud a third person or to commit any other illegal act, the maxim *in pari delicto potior est conditio defendantis* can hardly be made applicable. (HIDAYATULLAH J.)

Kedar Nath v. *Prahlad Rai*, (*ibid*).

Illegal purpose.

If the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered, he must fail. If the illegality be trivial or venial and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant cannot be allowed to take advantage of his position. But the plaintiff cannot be allowed to circumvent the illegality by some subterfuge or mis-statement of facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff had recanted before the illegal purpose was achieved, then, unless it is of such a gross nature as to outrage the conscience of the court, the defendant's plea should not prevail. (HIDAYATULLAH J.)

Kedarnath v. *Prahlad Rai*, (*ibid*).

BENGAL COURT OF WARDS ACT, 1879

S. 18—requirements as to sanction.

The requirements as to sanction must be deemed to be satisfied if the transaction in all its essential particulars has been sanctioned even though there are details to be worked out in furtherance of the sanction and no further sanction is given to the deed so finally settled. It is however open to the authorities to indicate the lines on which the deed will have to be drafted and reserve sanction until they have a full picture of the transaction as might appear on the document. (VENKATARAMA IYER J.)

Karanpura Development Co. v. *Kamakshya Narain Singh*, 1956 SCR 325 : 1956 SC 446 : 1956 SCA 591 : 1956 SCJ 511 : 35 Pat 573.

Power to grant long lease.

Sec. 18 which confers authority on the Court of Wards to enter into transactions is general and unqualified in its terms. A limitation such as there is in S. 29 (b) Guardian and Wards Act, 1890 cannot be read into S. 18 for obvious reasons.

The Court of Wards has not only the power but is under a duty to manage the estate, so long as it continues to be in its charge in the same manner as a prudent owner will manage his own estate and therefore the contention that the Court of Wards has no power to enter into a transaction of lease at a time when the ward would shortly be attaining majority, which has the effect preventing the ward from dealing with his estate for a considerable time after he attains

majority and which binds him to grant leases for a long time to come at the rates of royalties fixed a long time back, cannot be accepted.

1950 Pat 134 Reversed. (VENKATARAMA IYER J.)

Karanpura Development Co. v. *Kamakshya Narain Singh* (*ibid*).

Grounds on which power can be attacked.

The Court of Wards is not in the same position as a guardian of a minor. It is a statutory body, and the statute confers in clear and unambiguous terms the authority to judge whether the act is beneficial to the estate, to the Court of Wards and not to any outside authority. That being so, the exercise of such power can be attacked on the ground that it did not act bonafide and in the interest of the ward, and that its action amounted to a fraud on the power or on the ground that it did not, in fact, apply its mind to the question whether the act was for the benefit of the property or the advantage of the ward and come to a judgment as required by the section.

But where it has applied its mind and comes to an honest judgment in the matter, its decision is not liable to be questioned on the ground that it was erroneous on the merits, or that it was reached without considering some aspects which ought to have been considered, unless the failure to consider them is of such a character as to amount to there being no exercise of judgment at all.

1942 AC 206 and 1891 AC 666 Referred to. (VENKATARAMA IYER J.)

Karanpura Development Co. v. *Kamakshya Narain Singh* (*ibid*).

S. 70, Rule 242—scope of.

Rule 242 applies only to leases and is in terms inappliable to a deed which is an agreement. (VENKATARAMA IYER J.)

Karanpura Development Co. v. *Kamakshya Narain Singh*, (*ibid*).

BENGAL FERRIES ACT, 1885

Ss. 7, 8, 29—Rules under S. 15—Rules 2 & 7 (d).

The District Magistrate has no power to extend the term of lease beyond three years and at the end of it, there has to be a public auction to ascertain the bids.

1953 Pat 370 Affirmed. (CHANDRASEKARA IYER J.)

State of Bihar v. *Ram Bharosa Singh*, 1956 SC 640 : 1956 BLJR 425 : 1956 SCA 762.

BENGAL LAND REVENUE SALES ACT, 1859

S. 2—arrears—existence of Kistbandi agreement.

It cannot be contended that even in cases where a *kistbandi* or *kabuliyat* regulating the payment of Government Revenue is shown to have been executed by the proprietors and accepted by the Revenue authorities, the dates fixed by the Board of Revenue under S. 3 for payment of arrears are the crucial dates, whatever may be the dates when the instalments fall due according to the *kistbandi*.

59 Cal 186, 12 Pat 750 and 1926 Patna 549 distinguished ; 1948 Pat 422 affirmed. (PATANJALI SASTRI J.)

Kali Ram Dokania v. *Ulfat Hossain*, 1951 SC 6 : 1951 SCJ 242 : 30 Pat 247 : 6 DLR SC 80.

Sections 13, 14 and 37—sale of two component accounts.

A *touzi* was distributed into two shares, one being a separate account and the other being the residuary share. Both these shares came in course of time to be held by a single person and after him both the accounts were recorded in the names of his sons as joint proprietors. Land revenue fell in arrears in both the accounts and the two separate units of the estate from which separate items of arrears were due were notified for sale. No entry was filled up in the notifiction in the column meant to be filled in when the entire estate is to be put up for sale. Both the shares were purchased by a single person who claimed a right, under S. 37 of the Act, to annul all under-tenures, on the ground that as both the shares constituted the totality of the estate he must be deemed to be a purchaser of an entire estate.

Held, (negativing the claim), it cannot be contended that a sale for arrears of land revenue is not a sale under section 13 unless there is a share from which arrear is due and unless a notice of the intention to exclude that share is given in the advertisement for sale, or that a sale which is in fact of two different accounts is to be deemed a sale of the entire estate ; and there is nothing in the section disentitling the collector, where two separate accounts have been kept and both of them are in default, to notify for sale the separate accounts for recovery of arrears due from each of them separately. (MAHAJAN J.)

Gunendra Nath Mitra v. *Satish Chandra Hui*, 1953 SC 42 : 1953 SCJ 6 : 1953 SCR 277 : 1953 SCA 977.

S. 33—Existence of Kistbandi—non-mention.

The proprietor of an estate which was sold for arrears of land revenue appealed to the Commissioner on the ground that there was no arrear warranting the sale. He relied upon a *kistbandi* agreement but no specific reference to the *kistbandi* was made in that appeal petition. In a subsequent suit by the proprietor to set aside the sale on the same ground, it was contended that S. 33 barred the plaintiff from relying on the *kistbandi*.

Held, however important the *kistbandi* may be in establishing that there was no arrears, it was only evidential matter and could not be said to constitute a "ground" for annulling the sale and therefore non-specifying of it in the appeal to the Commissioner could not bar the plaintiff from relying upon it in the suit.

(PATANJALI SASTRI J.)

Kali Ram Dokania v. *Ulfat Hossain*, 1951 SC 6 : 1951 SCJ 242 : 30 Pat 247 : 6 DLR SC 80.

BENGAL LAND REVENUE SALES (WEST BENGAL AMENDMENT) ACT, 1950

S. 7—validity.

It is difficult to hold that the abridgement sought to be effected retrospectively by S. 7, of the rights of a purchaser at a revenue sale under the old S. 37 of the Bengal Land Revenue Sales Act, 1859 to annul all under-tenures and evict under-tenants, is so substantial as to amount to a deprivation of his property within the meaning of Art 31. Hence the Section is not constitutionally invalid.

1951 Cal 85 Reversed. (PATANJALI SASTRI C.J.)

State of West Bengal v. *Subodh Gopal*, 1954 SC 92 : 1954 SCJ 127 : 1954 SCR 587 : 1954 SCA 65 : 9 DLR SC 127 : 67 LW 206.

BENGAL WAKFS ACT, 1934 : **Ss. 29 & 40—appointment of temporary mutawalli by the Commissioner.**

Where the Board has delegated its functions under section 40 to the Commissioner, the Commissioner acts for and on behalf of the Board, and the rules cease to apply. The Commissioner is thus competent to appoint a temporary mutawalli to a Wakf. It cannot be contended that under the Rules framed by the Government the Commissioner could only make his report and recommendations and the Board alone was empowered to appoint a temporary mutawalli under section 40.

(HIDAYATULLAH J.)

Hazrat Syed Shah Mastarshid Ali v. *Commissioner of Wakfs, West Bengal.* 1961 SC 1095.

BERAR LAND REVENUE CODE, 1896

S. 205.

After an agreement to sell certain agricultural land was entered into between two persons, the vendor applied to the Revenue authorities for diversion of the land to non-agricultural user and sanction was accorded. Thereafter a person having a co-occupancy in the land in question brought a suit for pre-emption against the vendee but the sale deed was actually executed only after the suit was filed.

Held, as there was no transfer by way of sale, when the suit was brought, which could be subject to pre-emption, the plaintiff's suit must fail.

1953 Nag 182 Reversed ; case law discussed. (KAPUR J.)

Radhakishna L. Toshniwal v. *Sridhar Ramachandra,* 1960 SC 1368 : 1960 Nag LJ 684.

BERAR LAND REVENUE CODE, 1928

Ss. 157 and 192.

S. 157(1) which positively bars a suit is confined in express terms, to all claims on the ground of irregularity or mistake. It does not cover grounds other than those, for example, if a sale is attacked on the ground that the owner of the property was dead at the date of the sale or that there had been some fraud in connection with the sale proceedings or that he had been kept out of his remedy under the Code by some fraudulent act or that there was really no arrear due in respect of the property sold or such allied grounds; suits based on grounds like these will not be within the prohibition of S. 157 (1). S. 157 (2) specifically saves certain suits of the kind referred to therein but it does not necessarily follow that suits not directly within the terms of sub-section (2) are covered by the provisions of the positive bar laid down by sub-section (1). There may be a *tertium quid* between the grounds covered by section 157 (1) and 157 (2).

During the pendency of a mortgage suit in which a Receiver was appointed in respect of the mortgaged property, the property was sold for arrears of land revenue. The receiver filed a suit for a declaration that the revenue sale was void on the ground that no notice of demand was sent to the Receiver who was in charge of the property and that attachment and sale proclamation had not been effected according to law. The purchaser pleaded sections 157 and 192 of the Code in bar of the suit.

Held, (overruling the plea of the defendant), (i) the Code does not lay down any specific rule in respect of property which has been placed in *custodia legis,*

(ii) the suit in question was not covered by the express provisions of S. 157 (1), (iii) nor was the suit barred by S. 192.

1951 Nag 52 affirmed. (B. P. SINHA J.)

Kanhaiyalal v. *Dr. D. R. Banaji,* 1958 SC 725 : 1958 SCJ 891 : 1959 SCR 333 : 1958 MPLJ 477 : 1958 Jab LJ 501 : 1958 Nag LJ 404 : 1958 MPC 523.

BIHAR HINDU RELIGIOUS TRUSTS ACT, 1950

Constitutionality.

The provisions of the Act do not contravene Articles 25 and 26 of the Constitution.

Sections 2, 5, 6, 7 and 8 do not contravene Article 14.

Sections 28 and 32 do not violate the fundamental right guaranteed under Article 19 (1) (f).

Section 55 (2) does not override Article 136 or any other Article relating to appeals to the Supreme Court.

1954 Patna 266 affirmed. (S. K. DAS, J.)

Mahant Moti Das v. *S. P. Sahi,* 1959 Sup 2 SCR 563 : 1959 SC 942 : 1959 SCJ 114 : 1959 (2) SCA 432 : 38 Pat 639.

Extra territoriality.

The provisions of the Act cannot be struck down on the ground of extra-territoriality.

1957 SC 699 relied on. (S. K. DAS J.)

State of Bihar v. *Charusila Dasi,* 1959 SC 1002 : 1959 (2) SCA 369 : 1959 Sup 2 SCR 601 : 38 Patna 852 : 60 Pat. LR 1 : 1959 SCJ 1193 : 1959 BLJR 785.

Applicability.

The Act applies to all public religious and charitable institutions which are situated in the State of Bihar and any part of the property of which is in that State. (S. K. DAS J.)

State of Bihar v. *Charusila Dasi, (ibid).*

S. 2 (1)—whether includes private trusts.

Section 2 (1) defining "Religious Trust" does not include within its ambit private trusts and therefore the Act and its provisions do not apply to private trusts.

33 Patna 942 Reversed. (S. K. DAS J.)

(*Mahant*) *Ram Saroop Dasji* v. *S. P. Sahi,* 1959 SC 951 : 1959 Sup 2 SCR 583 : 38 Patna 661.

S. 29—Supersedes S. 92 C. P. C.

S. 29 supersedes, in respect of religious trusts in Bihar, S. 92 of the Civil Procedure Code. It cannot be said to be bad for extra-territoriality. Therefore in respect of the *Baidyanath* temple, a public trust in Bihar, for which a scheme had been framed under S. 92 C.P.C., by the Calcutta High Court (before the

formation of the Patna High Court), it was competent for the Bihar Board of Religious Trusts to take proceedings under the Act.

1954 Patna 262 Reversed. (S. K. Das J.)

State of Bihar v. *Bhavapritananda*, 1959 SC 1073 : 1959 SCJ 1197 : 1960 (1) SCA 245 : 1959 Sup 2 SCR 624 : 38 Patna 834.

BIHAR PRESERVATION AND IMPROVEMENT OF ANIMALS ACT, 1955.

S. 3 (as amended in 1959) and Rule 3 under S. 33—validity.

S. 3 of the Act in so far as it has increased the age limit to 25 in respect of bulls, bullocks and she-buffaloes imposes an unreasonable restriction on the fundamental right guaranteed by Art. 19 of the Constitution, a restriction moreover which cannot be said to be in the interests of the general public and to that extent is void. Rule 3 of the Bihar Preservation and Improvement of Animals Rules, 1960 is also bad in so far as it imposes disproportionate restrictions.

1950 SCR 759 Relied on; 1959 SCR 629 Ref. to. (S. K. Das J.)

Abdul Hakim Quaraiashi v. *State of Bihar*, 1961 SC 448.

BIHAR PRIVATE FORESTS ACT, 1946 and BIHAR PRIVATE FORESTS ACT, 1948

Validity.

The Bihar Private Forests Acts of 1946 and 1948 were validly enacted and do not violate the provisions of the Government of India Act, 1935. (Ayyangar J.)

Guru Datta Sharma v. *State of Bihar*, 1961 SC 1684.

BIHAR SATHI LANDS (RESTORATION) ACT, 1950

Validity.

The Act is void as it offends Art. 14 of the Constitution.

1952 Patna 194 Reversed. (Mukherjea J.)

Ram Prasad Narayan Sahi v. *State of Bihar*, 1953 SCR 1129 : 1953 SC 215 : 1953 SCJ 267 : 1953 SCA 578 : 8 DLR SC 289 : 32 Pat 375 : 1 BLJ 318.

BIHAR WAQFS ACT, 1948.

S. 58.

The provisions of S. 58 are not unreasonable restrictions on the exercise of the duties of a *mutawalli* nor do they offend any of the provisions of the Constitution. The fact that no provision is made for an appeal against the order of the *Majlis* does not render the section unreasonable, for the powers of the *majlis* are not unrestricted. (Imam J.)

Bashiruddin Ashraf v. *State of Bihar*, 1957 SC 645: 1957 SCJ 714 : 1957 Crim LJ 1023: 1957 SCC 325 : 1957 (i) MLJ 680 : 1958 BLJR 1 : 36 Pat 942.

BOMBAY BUILDINGS (CONTROL ON ERECTION) ACT, 1951

S. 15 (1).

Where under the provisions of an Ordinance empowering the Government to extend the provisions thereof to any place other than the area to which the Ordinance originally applied, a notification was issued extending it to a particular place but on the repeal of the Ordinance by the Act of the Legislature containing similar provisions and conferring power of extension to the Government, another similar notification was not issued extending the Act to the place in question ;

Held, such a fresh notification was not necessary since the Act itself provided that the provisions of the General Clauses Act (continuing in force notifications etc., issued under a repealed enactment under the re-enacted statute without fresh notification) shall apply to the repeal of the Ordinance as if it were an enactment.

(1951) Bombay 271 Reversed. (MAHAJAN J.)

State of Bombay v. *Pandurang Vinayak*, 1953 SC 244 : 1953 SCR 773 : 1953 SCJ 330 : 1954 SCA 293 : 8 DLR SC 448 : 55 Bom LR 526 : 54 Cr LJ 1094.

BOMBAY CITY CIVIL COURT ACT, 1948

Validity.

The Act is not *ultra vires* the legislature of the Province of Bombay as dealing with matters specified in List I of Sch. VII of the Government of India Act, 1935.

(*per curiam*)

State of Bombay v. *Narottam Das*, 1951 SCR 51 : 1951 SC 69 : 1951 SCJ 103 : 6 DLR (SC) 139 : BLR 1951 SC 67 : 53 Bom LR 402.

S. 4—Validity.

S. 4 is not void as amounting to delegation of legislative power to the executive in the matter of investing the court with extended jurisdiction.

The fixation of the maximum limit of the Court's pecuniary jurisdiction is the result of exercise of the legislative will. All that was left to the discretion of the executive Government was the determination of circumstances under which the court would be clothed with enhanced jurisdiction. This is a species of conditional legislation coming directly within the principles enunciated in 5 Cal. 172 (P.C.) by the Judicial Committee.

1951 Bom. 180 reversed. (S. R. DAS J.)

State of Bombay v. *Narottamdas*, (*ibid*).

BOMBAY CITY LAND REVENUE ACT, 1876

S. 8—burden of proof.

It is open to the superior holder under this section to plead and prove that the State has no right to levy any assessment. The burden is on the person who pleads a limitation on the right of the State to assess, to clearly establish it.

(VENKATARAMA IYER J.)

Collector of Bombay v. *Nusserwanji*, 1955 SCR 1311 : 1955 SC 298 : 1955 SCJ 339 : 1955 SCA 692 : 57 Bom LR 723.

The Government acquired certain Foras lands and under the Land Acquisition Act 6 of 1857 the entire estate, right, title and interest, subsisting thereon became extinguished, and the lands vested in the Government absolutely freed from 'Foras tenure', subsequently they were sold by the Goverment under a deed.

Held, in the circumstances, the purchaser obtained them as freehold and not as Foras lands, for, as the tenure under which the lands were originally held had become extinguished as a result of the land acquisition proceedings, it was incapable of coming back to life, when the lands were sold under the deed. Therefore the right of the Government to assess the lands under S. 8 was not limited by any right in the purchaser. (VENKATARAMA IYER J.)

Collector of Bombay v. *Nusserwanji* (*ibid*).

Right in limitation—whether includes total exemption.

The Government of Bombay by a resolution made over a certain piece of land to the Corporation free of "rent", for the purpose of constructing a market for the benefit of the whole community. But no formal grant complying with the statutory formalities was made. Pursuant to the resolution of the Government, the Corporation entered into possession and erected the market buildings and was in possession for over 70 years. Thereafter the Government proposed to assess the land under S. 8 and the Corporation sued for a declaration that the assessment was *ultra-vires*.

Held, though by reason of the non-compliance with the statutory formalities the resolution was not an effectual grant passing title to the Corporation and was also not an enforceable contract, there was no doubt as to the existence of an intention on the part of the Government to make and on the part of the Corporation to take a grant of the land in terms of the resolution including an undertaking by the Government not to charge any rent. The position of the Corporation therefore was that of a person having no legal title but nevertheless holding possession under colour of an invalid grant in perpetuity and free from rent for the purposes of a market. Such possession not being referable to a lawful title was *prima facie* adverse to the legal title of the Government as owner from the very moment the Corporation took possession under the invalid grant. This possession having continued openly as of right and uninterruptedly for over 70 years the Corporation had acquired the limited right it had been prescribing for during all this period, that is to say, the right to hold the land in perpetuity free from rent but only for the purposes of a market in terms of the Government resolution. The immunity from the liability to pay rent is just as much an integral part or an inseverable incident of the title so acquired as to the obligation to hold the land for the purpose of a market and no other purpose. Though there is no question of acquisition by adverse possession of the Government's prerogative right to levy assessment, the right acquired includes as part of it an immunity from payment of rent which must necessarily constitute a right in limitation of the Government's right to assess in excess of the specific limit established and preserved by the Government resolution. The words of S. 8 would also apply to a case where total exemption from assessment was granted. In other words, the specific limit may be nil for the purposes of S. 8. Therefore the plaintiff was entitled to the declaration prayed for.

Case Law discussed. (S. R. DAS J.)

Collector of Bombay v. *Municipal Corporation of Bombay*, 1952 SCR 43 : 1951 SC 469 : 1951 SCJ 752 : 54 Bom LR 122.

S. 13 Proviso (as amended in 1954)—validity.

S. 13 cannot be assailed as repugnant to Art 14 of the Constitution of India.

(S. R. DAS C.J.)

Purushotham Govindji v. *Shri B. M. Desai*, 1955 (2) SCR 887 : 1956 SC 20 : 1956 SCA 465 : 1956 SCJ 75 : (1955) 28 ITR 891 : 58 Bom LR 498 : 1956 Cri LJ 129 : 1956 Andh LT 1 : 1956 (1) MLJ 51.

BOMBAY DISTRICT MUNICIPALITIES ACT, 1901

S. 59 (1) (xi)—Validity.

S. 59 (1) (xi) is not unconstitutional as an execessive delegation of legislative power.

(S. R. DAS C.J.)

Western India Theatres Ltd. v. *Municipal Corporation of the City of Poona*, 1959 SC 586 : 1959 SCJ 390 : 1959 (2) SCA 145.

BOMBAY FORAS ACT, 1851

S. 2.

The true import of the clause unmistakably is that whlel, on the one hand the right of the Government to recover the assessment is saved, it is, on the other, hand, limited to the amount then payable by the occupants.

(VENKATARAMA IYER J.)

Collector of Bombay v. *Nusserwanji*, 1955 SCR 1311 : 1955 SC 298 : 1955 SCJ 339 : 1955 SCA 692 : 57 Bom LR 723.

BOMBAY FORWARD CONTRACTS CONTROL ACT, 1947.

S. 8 and Essential Supplies (temporary powers) Act, 1946—whether inconsistent mutually.

The effect of section 8 is not to render forward contracts made in terms of it legal. The Bombay Act clearly intends only to create an illegality, that is to say, it takes a legal contract and imposes on it certain conditions and makes it illegal if these conditions are not fulfilled. If a contract is already illegal there is no scope for applying the Act.

There is no repugnancy between the Bombay Act and the Essential Supplies (Temporary Powers) Act, 1946 (Central Act) for there may be contracts to which the Central Act would not apply and such may be rendered illegal by the Bombay Act, S. 8. Therefore there is no scope for applying the provisions of S. 107 (2) of the Government of India Act, 1935, The position in 1948 when the Bombay Act came into force and the Central Act was already in existence, would be that both Acts applied to Greater Bombay area, there being no inconsistency between the two Acts. The Constitution of India had not affected such application. That being the position, a forward contract in ground nuts, even though made in compliance with the requirements of S. 8 of the Bombay Act, would be illegal being prohibited by the Central Act. As the contract itself is illegal an arbitration clause contained in that contract will be of no effect and an award made under the arbitration clause will be a nullity and will have to be set aside.

1955 Bombay 35 affirmed. (SARKAR J.)

Basant Lal Banarsi Lal v. *Bansilal Dagdulal*, 1961 SC 823.

BOMBAY HEREDITARY OFFICES ACT, 1874

S. 4—Watan property.

The attributes of watan property do not accrue to a *wada* (house) which was constructed after the grant on land which is *watan* property, although it is immoveable property.

(IMAM J.)

Appasahib Tuljaram v. *Bhalchandra Vithal Rao*, 1961 SC 589.

Ss. 4 and 22.

When property which was originally *watan* is continued with the holder thereof but the obligation to render any service connected with the office is dispensed with and full assessment in respect of the land is levied and there is no evidence as to the original character of the grant or as to how and when the land was resumed and thus became subject to ordinary occupancy rights, it must be held that the property ceases to have the character of *watan* and is subject to the ordinary law of land tenures. (SINHA J.)

Lachcharam Datta Patil v. *Vishwanath Pundalik Patil*, 1956 SCR 675 : 1957 SC 34 : 1956 SCJ 721 : 1956 SCA 1082 : 59 Bom LR 93 : 1956 SCC 431.

BOMBAY HINDU DIVORCE ACT, 1947

S. 3 (d), desertion—essentials.

In order to constitute an offence of desertion two conditions should be there so far as the deserting spouse is concerned, namely :—

1. The factum of separation ; and
2. The *animus deserendi*, namely, the intention to bring the cohabitation to an end permanently.

Similarly so far as the deserted spouse is concerned two elements are essential :—

1. Absence of consent ; and
2. Absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The offence of desertion commences when the fact of separation and the '*animus deserendi*' coexist. But it is not necessary that they should commence at the same time. (SINHA J.)

Bipin Chandra Shah v. *Prabhavati*, 1956 SCR 838 : 1957 SC 176 : 1957 SCJ 144 : 1957 SCA 143 : 59 Bom LR 322 : 1957 SCC 48.

Constructive desertion.

If one spouse by his words and conduct compels the other to leave the marital home the former would be guilty of "constructive desertion," though it is the latter who has physically separated from the other, for the test is not who left the matrimonial home first.

The spouse who pleads constructive desertion by the other must substantiate it by reliable evidence. But where the defendant-wife pleads constructive desertion in answer to the plaintiff's claim for divorce on the ground of desertion, the fact that she has failed to prove it does not necessarily lead to the conclusion that the plaintiff has succeeded in proving his case. (SINHA J.)

Bipin Chandra Shah v. *Prabhavati*, (*ibid*).

Duty of deserted spouse.

The Act provides that desertion must continue for a continuous period of four years. Hence, if a deserting spouse takes advantage of the "*locus poenitentiae*" thus provided by law and decides to come back to the deserted spouse by a bonafide offer of resuming the matrimonial home with all the implications of marital life before the statutory period is out, or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the

marriage and be ready and willing to resume married life on such conditions as may be reasonable. But once it is found that one of the spouses has been in desertion the presumption is that desertion has continued and it is not necessary for the deserted spouse actually to take steps to bring the deserting spouse back to the matrimonial home. (SINHA J.)

Bipin Chandra Shah v. *Prabhavati*, (*ibid*).

Proof of desertion.

In proceedings for divorce the plaintiff must prove the ffence oof desertion beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law, the Courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the Court. (SINHA J.)

Bipin Chandra Shah v. *Prabhavati*, (*ibid*).

The wife's leaving her husband's place in shame not having the courage to face him after the discovery of her immoral conduct will not render her a deserter in the eye of law. (SINHA J.)

Bipin Chandra Shah v. *Prabhavati*, (*ibid*).

BOMBAY HOUSING BOARD ACT, 1948

S. 3-A.

S. 3A of the Bombay Housing Board Act cannot be challenged as unconstitutional on the ground of contravention of Art. 14 of the Constitution.

(S. R. DAS J.)

Baburam Shantaram More v. *Bombay Housing Board*, 1954 SC 153 : 1954 SCR 572 : 1954 SCJ 210 : 9 DLR SC 237.

Bombay Khoti Settlement Act, 1880, S. 9—Sale without consent of Khote before the Bombay Tenancy Act, 1939.

A who held a sale from an occupancy tenant of Khoti land before the coming into force of the Bombay Tenancy Act, 1939 for which sale the consent of the Khote had not been obtained, sued for a declaration of title one B who claimed under a prior similar sale. Neither of the two sales had been challenged by the Khote.

Held, whether a sale by an occupancy tenant of Khoti land without the consent of Khote before the Bombay Tenancy Act, 1939, is regarded as void or voidable, no title passed to A under the sale in his favour and his suit was liable to be dismissed. (RAGHUBAR DAYAL J.)

Daji Krishnaji Desai v. *Ganesh Vishnu Kulkarni*, 1961 SC 1564.

BOMBAY LAND REQUISITION ORDINANCE, 1947

Ss. 3 & 4—nature of decision as to public purpose.

The decision of the Provincial Government under these sections as to public purpose contains no judicial element in it and is an administrative act and hence cannot be corrected by a writ of *Certiorari*.

1949 Bom 277 Reversed. (KANIA C.J.)

Province of Bombay v. *Khushaldas Advani*, 1950 SC 222 : 1950 SCR 621 : 1950 SCJ 451 : 53 Bom LR 1 : 1950 (2) MLJ 703 : 1950 MWN 802 : 86 CLJ 330.

BOMBAY LAND REQUISITION ACT, 1948

Constitutional validity.

The Act is not invalid for the reason that it did not specify a public purpose.

1952 SCR 889 followed.

Nor is an order of requisition made under the Act invalid because it does not set out the purpose of the requisition. The omission is not fatal so long as facts are established to the satisfaction of the Court that there is a public purpose.

1954 S.C. 359 applied. (BOSE J.)

State of Bombay v. *Bhanji Munji*, 1955 SCR 777 : 1955 SC 41 : 1954 SCA 1286 : 1955 SCJ 10 : 57 Bom LR 595.

S. 4 (3)—premises—burden of proof.

Where the question is whether an order of requisition under the Act is valid and it turns upon whether the premises in question were "let" or "intended to be let" and therefore were "premises" within the meaning of the Act, the burden is on the owner or tenant of the premises in question, and not on the State Government, to show that the order, which *prima facie* complies with the provisions of the statute, is illegal.

1952 Bom 476 Reversed. (BOSE J.)

State of Bombay v. *Bhanji Munji*, (*ibid*).

S. 5 (1)—public purpose.

It is impossible to precisely define the expression "public purpose". In each case, all the facts and circumstances will require to be closely examined in order to determine whether a 'public purpose' has been established.

Prima facie the Government is the best judge as to whether 'public purpose' is served by issuing a requisition order, but it is not the sole judge. The courts have the jurisdiction and it is their duty to determine the matter whenever a question is raised whether a requisition order is or is not for a "public purpose".

The order of the Government requisitioning a building for housing an officer of the State Road Transport Corporation is an order for a 'public purpose' as it is essential for the Corporation to provide such accommodation to its employees in order to ensure an efficient working of the Road Transport System.

(IMAM J.)

State of Bombay v. *Nanji*, 1956 SCR 18 : 1956 SC 294 : 1956 SCA 308 : 1956 SCJ 288 : 1956 SCC 147 : 58 Bom LR 978.

Ss. 5 & 6—finality of determination

Sections 5 & 6 provide that the determination of the State Government on the questions referred therein shall be conclusive evidence of the declarations so made. This does not take away the jurisdiction of the High Court and the Supreme Court under Arts. 226 and 32 respectively of the Constitution to examine whether the provisions of the Statute have been complied with. But the special powers of these Courts cannot extend to reopening of a finding by the State Government under these sections.

1951 Bom 303 (overruling 1950 Bom 144) referred to with approval.

(SINHA J.)

Lilavati Bai v. *State of Bombay*, 1957 S C 521 : 1957 SCA 465 : 59 Bom LR 934 : 1957 SCJ 557.

S. 6 (4) (a)—any other public purpose.

The words 'any other public purpose' in S. 6 (4) (a) should not be read *ejusdem generis* with the words "the purpose of the State". Requisitioning of certain

premises for housing a member of the staff of a foreign consulate is a public purpose for which the State of Bombay can legislate.

1953 Bombay 337 Reversed. (CHANDRASEKHARA IYER J.)

State of Bombay v. *Ali Gulshan*, 1955 (2) SCR 867 : 1955 SC 810 : 1956 SCA 17 : 1955 SCJ 822 : 58 Bom. LR 490 : 1956 SCC 117.

S. 6, Explanation (a)—"or otherwise."

The words "or otherwise" should not be construed *ejusdem generis* with the words immediately preceding them. (SINHA J.)

Lilavati Bai v. *State of Bombay* ; 1957 SC 521 : 1957 SCA 465 : 1957 SCJ 557 : 59 Bom. LR 934.

BOMBAY LAND REVENUE CODE, 1879

Ss. 45 and S. 48—Basis for Assessment and S. 52.

Assessment depends upon the use to which the land is put. Where the land of the inamdar is not being used for agriculture and is actually being used for non-agricultural purposes, namely, for the purpose of building, it could be assessed as non-agricultural (read with S. 5 of the Bombay Personal Inams Abolition Act, 1953).

Where the inam land in question was not wholly exempt from revenue and in fact, no assessment had been fixed on that land under ChapterVIII-A, S. 52 would apply. (WANCHOO J.)

Ranvildas v. *Collector of Surat*, 1961 SC 291.

Ss. 65 and 66—removal of unauthorised structure.

On a true construction of sections 65 and 66 an occupant of unalienated land is only entitled to the use and occupation of the land for the purpose of agriculture and any user unconnected with agriculture is unlawful. Where such a person has erected structures without obtaining the prior permission of the Collector, he is liable to be evicted and his rights will come to an end. For the purpose of vacation it is necessary that any such construction must also be removed otherwise there cannot be any vacation of the land nor can the land be put to effective use for the purpose for which agricultural lands are normally accepted to be used. It is not necessary, in such a case, to have any specific power to have the land vacated of all unauthorised superstructures; the power to remove them is incidental and ancillary to the power to evict and to get the land vacated.

1955 Bombay 375 Reversed. (KAPUR J.)

State of Bombay v. *Fakir Umar Dhanse*, 1961 S C 722.

S. 67 (before amendment in 1913).

An agreement between the 'Collector' and the registered occupant is not the agreement contemplated by the Section, for the "Collector" is not the same as the "Government" and there is no rule framed by the Government which empowers the Collector to act on behalf of the Government with reference to S. 67.

(JAGANNADHA DAS J.)

State of Bombay v. *Mulji Jetha*, 1955 SC 325.

S. 74—Relinquishment by registered occupant.

Where there are more occupants than one in respect of the same occupancy each occupant has his own rights and the fact of registration of one of them as the registered occupant does not take away the rights of the other occupants. Therefore the registered occupant does not, in the absence of clear pleading and strict proof that he had express or implied authority or that he was the manager of the joint family consisting of himself and the other occupants, have an inherent right to give a notice of relinquishment so as to affect the interests of other occupants.

(S. R. Das C. J.)

Lilachand Tuljaram v. *Mallappa Thukaram*, 1960 (1) SCR 693 : 1960 SC 85: 1960 SCJ 96 : 62 Bom LR 134.

S. 136—*Lal-liti* holder.

Whatever may have been the position of a *Lal-liti* holder earlier, on the passing of the Bombay Taluqdari Tenure Abolition Act, 1949, he became a holder in actual possession of land in respect of which the Government had not transferred its rights to the payment of revenue wholly or partially to the ownership of any person, and such *Lal-liti* lands are subject to the payment of Land Revenue under the Code after the passing of the 1949 Act. (S. K. Das J.)

Bhimjibhai v. *State of Bombay*, 1960 SC 438.

Rules under, R. 92.

Rule 92 in imperative terms directs the Collector to alter the assessment in case agricultural lands are converted to non-agricultural use and the Collector has no option in the matter and as soon as an application is made to him he should proceed to make an assessment and levy it on the non-agricultural lands. If the Collector declines, at a time when no "directions to the contrary" have been given to him by the Government, to do so, he will be clearly acting in contravention of the provisions of the rule. The power given to the Government to give directions to the Collector not to act in accordance with the imperative provisions of the rule enjoining him to make an altered assessment, has to be exercised in clear and unambiguous terms as it affects civil rights of persons concerned and the decision that the power has been exercised should be notified in the usual manner in which such decisions are made known to the public. (Mahajan J.)

Fatma Haji Ali v. *State of Bombay*, 1951 SCR 266: 1951 ALJ 1 : 1951 SC 180: 1951 SCJ 247 : 53 Bom L R 951:6 DLR SC 134.

BOMBAY LOTTERIES AND PRIZE COMPETITIONS CONTROL AND TAX ACT, 1948

The Act cannot be impugned on the ground of extra territoriality.

(S. R. Das C.J.)

State of Bombay v. *R. M. D. Chamarbaugwalla*, 1957 SC 699 : 1957 SCJ 607 : 1957 SCA 867 : 1957 (2) MLJ 87 : 59 Bom. LR 945.

S. 12A—validity.

S. 12A is supportable as a valid piece of legislation under entry 62 of List II of the Seventh Schedule to the Constitution.

1956 Bom. 1 Reversed . (S. R. Das C.J.)

State of Bombay v. *R.M.D. Chamarbaugwalla*, (*ibid*).

BOMBAY MUNICIPAL BOROUGHS ACT, 1925

S. 35 (3)—whether mandatory.

The provisions of S. 35 (3) are directory and not mandatory and that any omissions in the manner of service of the notice are mere irregularities which would not vitiate the proceedings unless it is shown that those irregularities had prejudicially affected the proceedings. (SINHA J.)

Shyabbudin Sab M. Akki v. *Gadag Municipality*, 1955 SCR 1268 : 1955 SC 314 : 1955 SCA 709 : 1955 SCJ 316 : 57 Bom LR 671.

S. 35 (6).

It is evident from the provisions of S. 35 (6) that though the presence of the public at such meetings may be desirable, it is not obligatory. (SINHA J.)

Shyabbudin Sab Akki v. *Gadag Municipality*, (*ibid*).

S. 58 (j), S. 75 Explanation and S. 78 (1) (d).

Rule 2-C framed by the Barsi Municipality under S. 58 (j) of the Act levying a tax on mills, factories and buildings relating thereto based on valuation in proportion to the floor area is invalid.

(1952) Bombay 918 criticised and overruled. (SHAH J.)

Lokmanya Mills, Barsi Ltd. v. *Barsi Borough Municipality*, 1961 SC 1358.

BOMBAY PERSONAL INAMS ABOLITION ACT, 1953:

S. 1—Validity

The Act is protected by Art 31-A of the Constitution. Nor can the argument that it is not open to the State to enact a law which would in any way vary the terms of a *Sanad i.e.* an argument based on the immutability of *Sanads*, be accepted.

1946 FCR 111 and 1955 (2) SCR 164 Relied on; 1957 Bom 270 affirmed. (WANCHOO J.)

Rangildas V. Collector of Surat, 1961 SC 291.

S. 7.—Scope.

The exception made in S. 7 only saves certain inam lands from vesting in Government and no more. The result of the exception is that such inam lands do not vest in Government and remain what they were before and are thus subject to the provisions of Ss. 4 and 5 of the Act. (WANCHOO J.)

Rangildas V. Collector of Surat, 1961 SC 291.

BOMBAY PUBLIC TRUSTS ACT, 1950

Sections 18, 31 to 37, 48, 50, 58 and 66—validity.

The provisions of sections 18, 31 to 37, 48, clauses (e) and (g) of section 50, 58 and 66 are valid.

1953 Bom. 242 affirmed.

Sections 44, 47, 55 and 56—validity.

The following provisions are void :—

(i) S. 44 to the extent it relates to the appointment of the Charity Commissioner as a trustee of religious public trust by the Court ;

(ii) Clauses (3) to (6) of Section 47 and

(iii) Clause (c) of S. 55 and the part of clause (1) of S. 56 corresponding thereto.

1953 Bom. 242 reversed.

Ratilal Panachand Gandhi v. *State of Bombay*, 1954 SCR 1055 : 1954 SC 388 : 1954 SCJ 480 : 1954 SCA 538 : 56 Bom LR 1184 : 1954 (1) MLJ 718.

BOMBAY REVENUE JURISDICTION ACT, 1876

S. 4 (a).

The section is general and bars all "claims against the Crown relating to lands .....held as *saranjam*". That is to say, even if the Government's act in relation to such lands was *ultra vires*, a suit impugning the validity of such an act would fall within the scope of the exclusion in clause (a) provided it relates to such land.

74 Ind. App. 103 distinguished.

It cannot be said that if the only relief claimed against the Government is a mere declaration, that does not amount to a claim against the Government and that S. 4 is not attracted.

(1948) Bom 809 not approved ; 47 Bom. LR 214 approved. (Bose J.)

Bhujanga Rao Daulat Rao v. *Maloji Rao*, 1952 SCR 402 : 1952 SC 138 : 1952 SCJ 125 : 54 Bom LR 439 : BLR 1952 SC 172.

BOMBAY SECURITIES CONTRACTS CONTROL ACT, 1925

S. 6.

In a contract of employment between a share-broker and a person for effecting sales and purchases of shares the relationship between them is one of principal and agent and not that of seller and purchaser. The contract of employment is no doubt connected, and intimately, with sales and purchases of securities but it is not itself a contract of sale or purchase. It is collateral to it, and does not become *ipso facto* void, even if the contract of purchase and sale with which it is connected is void.

1955 SCR 439 Relied on; 1952 Bom 95 Reversed.

The bar is to the broker claiming remuneration in any form for having brought about the contract. But the contract of emplyoment is not itself declared void and claim for indemnity will not be within the prohibition. The contract notes sent by a broker to his constituents are not themselves contracts for the sale or purchase but only intimations by the broker to the constituent that such contracts have been entered into on his behalf.

1924 Bombay 224 approved. (Venkatarama Iyer J.)

Jugal Kishore v. *Gool Bai Hormusji*, 1955 (2) SCR 857 : 1955 SC 812 : 1956 SCA 499 : 58 Bom LR 486: 1956 SCJ 64.

CALCUTTA MUNICIPAL ACT, 1923

Ss. 363 and 488.

The Corporation is not precluded from taking proceedings under S. 363 by reason of its having taken proceedings prior thereto under S. 488 read with rule 62 of Sch. XVII, for there is no principle of constructive *Res Judicata* and there is nothing in the statute which bars it from claiming relief under S. 363 in addition to the proceeding already taken under S. 488. The section gives the Magistrate a discretion whether he should pass an order under the section or not and an exercise of such discretion is not liable to be interfered with in appeal unless it is based on some misapprehension of principles applicable thereto or mistake of fact.

(VENKATARAMA IYER J.)

Corporation of Calcutta v. *Mulchand*, 1955 (2) SCR 995 : 1956 SC 110 : 1956 SCA 96 : 1956 SCJ 128.

S. 536.

Where an application is based solely and exclusively on a breach of Rule 62 of Sch. XVII no order can be passed for demolition under S. 536.

(VENKATARAMA IYER J.)

Corporation of Calcutta v. *Mulchand*, (*ibid*).

CALCUTTA POLICE ACT, 1866.

S. 39—Validity.

The argument that section 39 confers an arbitrary and uncanalised power without any criteria for guiding the discretion of the licensing authority must fail and in the setting in which Sec. 39 appears, the mere absence of a provision for a hearing or for communicating the reasons for refusal to the applicant does not make the section unconstitutional as an unreasonable restriction on a fundamental right under Art 19 (1) (g) of the Constitution ; for the applicant, if he thinks that the Commissioner has acted unreasonably in rejecting his application, can apply to the High Court under Art. 226 to compel the Commissioner to disclose the reasons for refusal before the Court and if those reasons are extraneous or are not germane to matters arising under S. 39, the High Court will compel the Commissioner to act within the scope of S. 39. (WANCHOO J.)

Kishan Chand Arora v. *Commissioner of Police, Calcutta*, 1961 SC 705.

CENTRAL PROVINCES AND BERAR MUNICIPALITIES ACT, 1922

Ss. 53A and 57.

These sectios only confer certain powers on the State Government but the latter is not bound to take any action under either of them. The two sections differ materially in their scope and content. While S. 57 (5) provides that no order should be passed until reasonable opportunity had been given to the Committee to furnish an explanation, the legislature did not think fit to provide a similar safeguard in S. 53A presumably because that order is only of a temporary duration. The conditions precedent to the exercise of the powers under both sections also overlap to some extent, namely, that action can be taken under both if the Committee "is not competent to perform the duties imposed on it .....". To that extent the State Government has the option of taking steps, if it considers it necessary to take action at all, under one section or the other according to its own assessment of the exigencies of the situation.

(S. R. DAS C.J.)

Radhe Shyam v. *State of Madhya Pradesh*, 1959 SC 107 : 1959 SCJ 6 : 1959 Nag LJ 49 : 1959 (1) MLJ 5.

S. 53 (A)—whether writ lies against action under.

An action to be taken under section 53 (A) is purely an administrative action but that is not to say that the State Government has not to observe the ordinary rules of fair play. But for a mere breach of these rules, a writ of *certiorari* will not lie.
(S. R. DAS C. J.)

Radhe Shyam v. *State of Madhya Pradesh*, (*ibid*).

Rule 9(1)—Compliance.

Reading Rule 9 (1) (iii) (c) in the light of S. 23, the omission to set out a candidate's occupation in the nomination paper cannot be said to affect the merits of the case. That part of the form is only directory and is part of the description of the candidate. Disclosure of a candidate's occupation would not necessarily reveal that he holds any office of profit under the committee disqualifying him to be a candidate.
(BOSE J.)

Pratap Singh v. *Shri Krishna Gupta*, 1956 (2 SCR 1029 : 1956 SC 140 : 1956 SCA 366 : 1956 SCJ 143.

CHARTERED ACCOUNTANTS ACT, 1949

S. 21 (1)—misconduct.

If a Chartered Accountant, while acting as a liquidator, which he is entitled to do under Regulation 78 of the Chartered Accountants Regulations, must be deemed to be in practice, as he must under S. 2 (2) (iv), all actions and omissions proved against him in respect of such conduct as liquidator must be characterised as his professional acts, and if he is guilty of gross negligence in such acts, it will be open to the High Court to take action against the Chartered Accountant.
(GAJENDRAGADKAR J.)

Council of the Institute of Chartered Accountants v. *B. Mukherjee*, 1958 SCR 371 : 1958 S.C. 72 : 1958 SCA 1132 : 1958 SCJ 312 : (1958) 28 Com. Cas. 1 : (1958) 1 An WR 81 : 1958 (1) MLJ 81.

Procedure.

In hearing a reference under S. 21 (1), the High Court can examine the correctness of the findings of the statutory body and can even refer back the matter for further enquiry by the council and call for a finding. It is not as if the High Court is bound in every case to deal with the merits of the finding as recorded and either to accept or reject the finding. If, in a given case, it appears to the High Court that, on facts alleged and proved, an alternative finding may be recorded, it can well send back the case to the council with appropriate directions in that behalf.
(GAJENDRAGADKAR J.)

Council of the Institute of Chartered Accountants v. *B. Mukherjee*, (*ibid*).

Ss. 21 & 22.

If a member of the Institute is found, *prima facie*, guilty of conduct which in the opinion of the council, renders him unfit to be a member of the institute,

even though such conduct may not attract any of the provisions of the Schedule, it will be still open to the council to hold an enquiry against the member in respect of such misconduct and a finding against him in such enquiry will justify appropriate action being taken by the High Court under S. 21 (3).

Observations in (1952) 22 Com. Cases. 168 (Bombay) held obiter.

(GAJENDRAGADKAR J.)

Council of the Institute of Chartered Accountants v. *B. Mukherjee*, (*ibid*).

CITIZENSHIP ACT, 1955.

S 9 (2)—Scope of the bar.

The only question which a Civil Court is prevented by S. 9 (2) from determining is the question whether a citizen of India has acquired the citizenship of a foreign country or when or how he acquired it. The Civil Courts are not prevented by this provision from determining other questions concerning nationality of a person.

A suit was field for a declaration that the plaintiff was a citizen of India and for an injunction restraining the Union of India from removing him from India. The plaintiff's case was that he had not ceased to be a citizen of India, that in the beginning of 1953, he went to Pakistan for a temporary visit and when he wanted to return he had been compelled to obtain a Pakistani Passport against his will and that therefore he could not be said to have acquired citizenship of Pakistan. It was contended by the defendant, *inter alia*, that the plaintiff had left India between March and May 1948 and that he had never acquired Indian citizenship, and that in any event the plaintiff had voluntarily acquired Pakistani citizenship by obtaining passport from that country and that the suit was not maintainable and should be dismissed.

Held, the jurisdiction of the Civil Court to decide the question whether the plaintiff, having migrated to Pakistan, had never acquired Indian citizenship, was not in any way affected by Section 9 (2). *Held* further, the Court should decide the question whether the plaintiff had never been an Indian citizen if that question was answered in the affirmative, then no further question would arise and the suit would have to be dismissed. If it was found that the plaintiff had been on 26-1-50 an Indian citizen, then only the question whether he had renounced that citizenship and acquired a foreign citizenship would arise and that question the court could not decide. The proper thing for the court would then be to stay the suit till the Central Government decided that question and then dispose of the rest of the suit in such manner as the decision of the Central Government may justify. (SARKAR J.)

Akbar Khan Alam Khan v. *Union of India*, 63 Pun. L. R. 830.

S. 9 (2) & Rule 30 under the Act—Jurisdiction of Court.

Under Rule 30 the authority to decide the question whether a person, an Indian citizen, has acquired citizenship of another country is the Central Government and such question cannot be decided by the Court. (SARKAR J.)

State of Andhra Pradesh v. *Abdul Khader*, 1961 SC 1467: 63 Pun. LR 751.

CIVIL SERVICE REGULATIONS

Art 465A—Note 1.

Note 1 to Article 465A is not repugnant to Art 311 of the Constitution and hence an order of the President compulsorily retiring an officer from service on his completing 25 years qualifying service, cannot be challenged on the ground that the civil servant had not been offered full opportunity of showing cause against the proposed action. (S. R. DAS J.)

Shyamlal v. *State of Uttar Pradesh*, 1954 SC 369 : 1954 (1) MLJ 730 : 1955 SCR 26 : 1954 SCJ 493 : 1954 SCA 476 : 1954 ALJ 324.

CODE OF CIVIL PROCEDURE, 1908

S. 9

[The Courts shall.....have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.]

Scope.

The conten ion that it is only when a right is created by a statue and a tribunal is set up for the determination of that right by that statute that the jurisdiction of Civil Court as to the question concerning that right is taken away cannot be accepted. (SARKAR J.)

Akbar Khan Alam Khan v. *Union of India*, 63 Pun LR 830.

Determination of question of Jurisdiction.

It is well settled that a Civil Court has inherent power to decide the question of its own jurisdiction, although, as a result of its enquiry, it may turn out that it has no jurisdiction over the suit. (S. R. DAS J.)

Bhatia Co-operative Housing Society v. *D. C. Patel*, 1953 SC 16 : 1953 SCR 185 : 1952 SCJ 642 : 1953 SCA 553 : 8 DLR SC 60 : 55 Bom. LR 199.

Exclusion of jurisdiction.

The exclusion of jurisdiction of the Civil Court in respect of a suit or an issue which is normally within its competence, can be brought about only by clear and unambiguous language, or by the necessary implication thereof.

(JAGANNADHA DAS J.)

Shiromani Gurudwara Prabandak Committee v. *Shiv Rattan Dev*, 1955 (2) SCR 67 : 1955 SC 455 : 1955 SCJ 466 : 57 Punj. LR 264.

"Expressly" barred—Bengal Agricultural Income-tax Act, 1944, S. 65.

A suit for an injunction restraining the taxing authorities from taking steps to assess the plaintiff which may eventually result in an unlawful imposition and levy of tax, is not a suit to set aside or modify an assessment and is not barred under S. 65 of the Bengal Agricultural Income-tax Act, 1944.

1947 F. C. 78 distinguished.

State of Tripura v. *State of East Bengal*, 1951 SCJ 70 : 1951 SC 23 : 19 ITR 132 : 1951 ITC 126 : 1951 CWN 113 : 1951 SCR 1: BLR 1951 SC 22.

"Impliedly" barred—Succession to Jagir in Rajasthan.

Under Art. 7 (3) of the covenant of rulers of Rajasthan, no other authority except the Rajpramukh of Rajasthan will be competent to decide questions of succession regarding Jagirs in Rajasthan and to recognise heirs to the Gaddi. That being so, no suit can be maintained in a civil court for a declaration of the plaintiff's right of succession to the Gaddi. The power of recognising heirs is political in character and is an incident of sovereignty. The jurisdiction of the civil courts is impliedly ousted for entertaining suits of this nature.

20 Ind. App. 50 Relied on. (MAHAJAN C.J.)

Umrao Singh v. *Bhagwati Singh*, 1956 SC 15 : 1956 SCC 62.

Suit for religious honours.

The *Explanation* to the section implies two things, namely :—

(i) A suit for an office is a suit of a civil nature, and

(ii) it does not cease to be one even if the said right depends upon entirely a decision of a question as to religious rites or ceremonies. It implies further that questions as to religious rites or ceremonies cannot independently of such a right form the subject matter of a civil suit.

Honours shown or precedence given to religious dignitaries when they attend religious ceremonies in a temple cannot be placed on a higher footing than the religious rites or ceremonies, for they are integral parts of the said rites or ceremonies in the sense that the said honours are shown to persons partaking in the ceremonies. *Prima facie,* honours such as who is to stand in the *Ghosti,* in what place, who is to get the *tulasi,* in which order and similar others cannot be considered to be part of the remuneration or perquisites attached to an office.

(SUBBA RAO J.)

[For a summary of the law on the subject, See *Sinha Ramanuja Jeer* v. *Ranja manuja Jeer,* 1961 SC 1720.]

S. 11. Res Judicata.

Compromise decree.

The terms of section 11 would not be strictly applicable to a decree passed in terms of a compromise, but the underlying principle of estoppel would still apply.

(BHAGWATI J.)

Sunderabai v. *Devaji Shankar Deshpande,* 1954 SC 82 : 1953 SCJ 693 : 1953 (2) MLJ 782.

Consent decree or decree by default.

A judgment by consent or default, is as effective an estoppel between the parties as a judgment whereby the court exercises its mind on a contested case.

(S. R. DAS C.J.)

Sailendra Narayan Deo v. *State of Orissa,* 1956 SCR 72 : 1956 SC 346 : 1956 SCA 870 : 1956 SCJ 449 : 22 Cut LJ 251.

Competency of former Court.

In order to determine whether the court which decided the former suit had jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of that court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit. If at that time such a court would have been competent to try the subsequent suit, had it been then brought, the decision of such court would operate as *res judicata* although subsequently, by a rise in the value of the property that court had ceased to be a proper court, so far as regards its pecuniary jurisdiction, to take cognizance of a suit relating to that very property.

(MAHAJAN J.)

Jeevantha v. *Hanumantha,* 1954 SC 9 : (1953) Hyd. 400 (Hyderabad Bench.)

Two appeals from one judgment.

The question of *Res Judicata* arises only when there are two suits. When there is only one suit, the question of *Res Judicata* does not arise at all even though two decrees may have been drawn up. For, the estoppel is not created by the decree but it can only be created by the judgment.

Where from the same decision, two sets of defendants preferred two separate appeals, but the 1st appellate court heard and disposed of them together by one judgment, and two decrees were drawn up, and the plaintiff filed one appeal (second appeal) impleading all the defendants, and subsequently filed another appeal against the other decree after the period of limitation, which was dismissed as time-barred and that dismissal was pleaded as a bar to the hearing of the other appeal;

Held (negativing the contention) that it is well settled that in such cases there need not be two appeals even though two decrees may have been drawn up.

1932 Mad. 689 approved.

Narhari v. *Shankar*, 1953 SC 419 : 1951 CWN SC 178 (Hyderabad Bench).

Litigating under the same title.

Where the right claimed in both suits is the same, the subsequent suit would be barred as *res judicata* though the right in the subsequent suit is sought to be established on a ground different from that in the former suit. It would be only in those cases, where the rights claimed in the two suits are different that the subsequent suit would not be barred, even though the property was identical.

A son predeceased his father leaving a widow G. Subsequently the father died leaving his widow S. G adopted one D and disputes arose between the parties. A compromise decree was passed declaring (1) that the adoption of D was invalid, (2) that the right of adoption was lost to G from the very beginning, (3) that D was not and could never become entitled to the property belonging to the family of the husband of S, and directing S to pay a certain sum to D and to continue to pay maintenance to G as before, to maintain peace in the family. The sum was paid to D and the maintenance was also continued to be paid to G. After the decision of the Privy Council in *Anant* v. *Shankar*, G adopted D again as a son to her husband. D sued S in ejectment.

Held, (1) D was litigating under the same title i.e., in the same right as the adopted son of G's husband, though that claim of his was sought to be based on a later adoption than the one in the former suit ; (2) the bar of *res judicata* would not apply to the compromise decree, (3) but D was estopped from making the present claim and contending that G had not lost her right of adoption as set out in cl. 2 of the compromise decree, for, the compromise decree has to be treated as an agreement or undertaking by D and G. (BHAGWATI J.)

Sunderabai v. *Devaji Shankar Deshpande*, 1954 SC 82 : 1953 SCJ 693 : 1953 (2) MLJ 782.

Execution Proceedings.

That the principle of constructive *Res Judicata* applies to execution proceedings is no longer open to doubt. (GHULAM HASAN J.)

Mohanlal Goenka v. *Benoy Krishna Mukherjee*, 1953 SC 65 : 1953 SCR 377 : 1953 SCJ 130 : 1953 SCA 475 : 8 DLR SC 159 : 1953 (1) MLJ 449 : 1953 MWN 328.

On an execution application (made to it) being dismissed for default the Court to which the decree had been transferred for execution sent to the transferor

Court, what purported to be a certificate under S. 41 C.P.C. and retained the copy of the decree, the order of transmission, and the certificate of non-satisfaction sent to it by the transferor Court. Without a fresh order of transmission the decree-holder again applied for execution. During the many proceedings that followed, the judgment-debtor either did not raise the question of want of jurisdiction in the transferee Court without a fresh order of transmision, or, having raised it, did not press it and the proceedings continued and culminated in a sale. Judgment-debtor filed an application under Or. 21 R. 90 to set aside the sale as void for want of jurisdiction.

Held, the question was not whether the transferee court had or had not jurisdiction after it had sent the certificate under S. 41, but whether the judgment-debtor is precluded by the principle of constructive *Res Judicata* from raising the question of jurisdiction and that the judgment-debtor was barred by *Res Judicata* from raising the question.

1950 Cal 287 Reversed; 53 All 560 held to have been wrongly decided; 52 All 868 ; 13 Ind. App. 134 ; 36 Cal 193 and 38 Cal 639 distinguished.

(GHULAM HASAN J.)

Mohanlal Goenka v. *Benoy Krishna Mukherjee*, (*ibid*).

Erroneous decision.

Even an erroneous decision on a question of law operates as *Res Judicata* between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as *Res Judicata*.

(GHULAM HASAN J.)

Mohanlal Goenka v. *Benoy Krishna Mukherjee*, (*ibid*).

Construction of a document.

The decision of the Privy Council in a litigation does not bind a person who was not a party thereto, but it operates as a judicial precedent, where the construction of a document is involved. (BOSE J.)

Sahu Madho Das v. *Mukand Ram*, 1955 (2) SCR 22 : 1955 SC 481 : 1955 SCA 1057 : 1955 SCJ 417 : 1955 (2) MLJ 1 : 1955 MWN 919 : (1955) 2 All 177.

S. 11 & Or. II R. 2—Partition suit—compromise decree.

In a joint family, consisting of six brothers, the eldest brother was running a liquor shop business. Two of the brothers were running a motor business. The five younger brothers sued the eldest brother for partition. The eldest brother was anxious to run the liquor shop business himself exclusively. There was a preliminary decree made on a compromise between all the parties. Each of the brothers was to get 1/6 in the cash balance, and the movables of the joint family, including the stock-in-trade, were to be divided among all the brothers. The compromise further provided that accounts of all the businesses were to be taken as on a particular agreed date (after which date the eldest brother had expressed, by the issue of a notice, his intention to run the liquor business exclusively himself). It further declared that the eldest brother was to have a share in the business run by the two others, and that they were to pay him the price of his one sixth share therein.

The eldest brother, however, commenced a fresh suit claiming a share in the profits of the motor business run by the two other brothers after the date agreed upon in the compromise, on the ground that that business was still a joint family

business and that parties had omitted to provide for the further conduct of that business ;

Held, dismissing the suit, that the cause of action was the same in both the suits, that the plaintiff had relinquished his claim to account for the subsequent period in respect of the motor business and that the suit was therefore barred both by *Res Judicata* and Or. II R. 2. (GHULAM HASAN J.)

Shankar Sitaram v. *Balakrishna Sitaram*, 1954 SC 352 : 1955 (1) SCR 99 : 1954 SCJ 552 : 1954 SCA 914 : 1954 Andh LJ SC 41 : 57 Bom. LR 1 : 67 LW 637.

S. 34—interest—whether can be awarded as damages.

Interest for a period prior to the commencement of a suit is claimable either under an agreement, or usage of trade or under a statutory provision or under the Interest Act for a sum certain where notice is given specifying the sum claimed ; interest is also awarded in some cases by courts of equity. But it is well settled that interest as damages cannot be awarded.

One D who had agreed to transport coal for one R rescinded the contract on the ground of non-payment of his bills by R in due time and sued him for arrears due on bills and for damages. *Held*, (while decreeing the claim for arrears due on bills), on the question of interest,—

Interest upto date of suit was not claimable for (1) there was no agreement, express or implied, about interest, (2) as the notice given did not specify the sum which was demanded, the Interest Act did not apply, (3) the case did not fall within those cases in which Courts of equity grant interest, and (4) interest could not be claimed as damages.

Held also, interest *pendente lite* was within the discretion of the Court. [The Supreme Court reduced the rate of interest to 4% from 6% awarded by the Court below as 6% in the circumstances and according to practice of Courts appeared high.]

(HIDAYATULLAH J.)

Mahabir Prasad Rungta v. *Durga Datta*, 1961. SC 190.

Future interest.

The amount due under a decree was paid out to the Official Assignee-in-insolvency of the plaintiff with a prayer that it should not be paid out to the creditors during the pendency of the appeal by the defendant. The decree was reversed and money was paid back by the Official Assignee. On further appeal the decree was restored.

Held, that future interest could not be allowed for the period when the Official Assignee had the use of the money, though it could not be distributed.

(MAHAJAN J.)

Trojan & Co. v. *Nagappa Chettiar*, 1953 SC 235 : 8 DLR SC 436: 1953 SCR 789 : 1953 SCJ 345 : 1954 SCA 710 : 1953 (1) MLJ 729.

Arbitration proceedings.

An arbitrator is not a court within the meaning of S. 34, nor does the Code apply to proceedings before arbitrators. (BOSE J.)

Thawardas v. *Union of India*, 1955 (2) SCR 48 : 1955 SC 468 : 1955 SCA 862 : 1955 SCJ 445 : 1955 (2) MLJ 23 : 57 Pun. LR 369 : 34 Pat. 359 : 1955 MWN 782.

S. 35—Costs to follow the event.

The fact that the respondent, who is an Official-Receiver-in-insolvency, intimates to the appellate Court that as, none of the creditors had come forward to finance the defence of the appeal, the insolvency court had ordered that the appeal might be left undefended, cannot absolve the respondent of liability to pay, when the appeal is allowed, the costs of the appellant which must follow the event. (BHAGAWATI J.)

T. S. Swaminatha Udayar v. *Official Receiver, West Tanjore,* 1957 SC 577: 1957 SCA 962 : 1957 SCJ 501 : 1957 (2) MLJ 53 : 1957 All WR 612 : 1957 (2) An WR 53.

Attitude of successful party.

Where the attitude taken in the litigation by one party to the appeal was lacking in *bonafides* and he succeeded on a point which he took for the first time in appeal, while he had failed in his other main pleas, the Supreme Court directed the parties to bear their own costs.

Keshavalal Lallubhai v. *Lalbhai Trikumlal Mills Ltd.*, 1958 SC 512 : 1959 SCR 213 : 1958 SCJ 866 : 60 Bom LR 948 : 1959 SCA 251 .

Remand.

The courts below had found a preliminary point in favour of the respondent before the Supreme Court. While the trial court had considered all the points the court of appeal decided the appeal only on the preliminary point, in spite of a request to decide all the points. The Supreme Court while reversing the decision on the preliminary point and remanding the case to the lower appellate court for disposal on all points, directed, taking into consideration that the respondent, a petty landlady, was pitted against the Government, who considered it as a test case, that each party bear its own costs in the Supreme Court, as well as in the first appellate court.

Dominion of India v. *Shrinbai A. Irani* , 1954 SC 596 : 1955 (1) SCR 206 : 1954 SCJ 813.

Ss. 37 and 38—irregular assumption of Jurisdiction.

It is settled law that the Court which actually passed the decree does not lose its jurisdiction by reason of the subject matter thereof being transferred subsequently to the jurisdiction of another Court.

(Conflict of opinion, as to whether the latter Court also has jurisdiction, between the Calcutta cases 6 Cal. 513, 23 Cal. 1238 and 35 Cal. 974 and the Madras case 35 Mad. 801 (FB) supported by (1942) 1 Cal. 289 not resolved.)

But if the latter court which acquires an inherent jurisdiction over the subject matter entertains an execution application with reference thereto, it would at the worst be an irregular assumption of jurisdiction and not a total absence of it and if objection is not taken to it at the earliest opportunity it must be deemed to have been waived and cannot be raised at any later stage of the proceedings.

(1943) Mad 804 applied. (VENKATARAMA IYER J.)

Merla Ramanna v. *Nallappa Raju*, 1956 SC 87 : 1955 (2) SCR 938 : 1956 SCJ 101 : 1956 SCA 33 : 69 LW 875 : 1956 (1) MLJ 71.

S. 39—Omission to send copy of decree and certificate of non-satisfaction.

The High Court transferred a decree passed by it in its original jurisdiction for execution to another court and also sent a copy of the decree and the order of transmission and a certificate of partial satisfaction of the decree. An execution petition filed in the transferee Court was dismissed for default. The Court purported to send a certificate under S. 41 but retained the other documents previously received from the High Court. Subsequently the decree-holder took out a Master's Summons in the High Court praying for leave to the transferee Court to sell the property of the judgment-debtor in execution and the prayer was granted. On a subsequent application for execution to the transferee Court without an order of fresh transmission, the property of the judgment-debtor was sold. The judgment-debtor applied to set aside the sale as void, on the ground that since there was no fresh transmission the transferee Court had no jurisdiction.

Held, the Code does not prescribe any particular form for an application for transmission of a decree under S. 39. Under sub-section (2), the Court can even *suo motu* send the decree for execution to another court. It is true that Or. 21 R. 6 provides that the court sending a decree for execution shall send a copy of the decree, a certificate setting forth that satisfaction of the decree had not been obtained by execution within the jurisdiction of the court, and a copy of the order for the execution of the decree. But an omission to send a copy of the decree, or the certificate referred to in Or. 21 Rule 6 (b) does not prevent the decree-holder from applying for execution to the court to which the decree has has been transmitted. As the copy of the decree and the certificate of non-satisfaction were still lying in the transferee court, sending them over again would have been a mere formality. In the circumstances, such omission was a mere irregularity which did not affect the jurisdiction of the executing Court and not a material irregularity within the meaning of Or. 21 R. 90 and as such could not be made a ground for setting aside the execution sale. (DAS J.)

Mohanlal Goenka v. *Benoy Krishna Mukherjee*, 1953 SC 65 : 1953 SCR 377 : 1953 SCJ 130 : 1953 SCA 475 : 8 DLR SC 159 : 1953 (1) MLJ 449 : 1953 MWN 328.

S. 47(1)

[All questions arising between the parties to the suit.....or their representatives, and relating to execution, discharge, or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit.

(2) The Court may, subject to.....limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding.....]

Bar under.

In a suit for possession against a person, who is bound by a decree for possession passed in a previous suit by the same plaintiff, the bar under S. 47 is not insuperable, as the section empowers the court to treat the suit as an execution proceeding, when there is no question of limitation or jurisdiction standing in the way of the plaintiff. (MUKHERJEA J.)

Jagadguru Gurusiddhaswami v. *Dakshina Mahasrahtra Digambar Jain Sabha*, 1953 SC 514 : 1954 SCR 235 : 1953 SCJ 730 : 1953 SCA 1025 : 9 DLR SC 12 : 56 Bom. LR 783 : 1953 (2) MLJ 819 : 67 LW 12.

Complicated question.

There can be no objection to decide questions involving investigation of complicated facts or difficult questions of law in execution proceedings, as the section

authorises the executing Court to decide all questions arising therein and relating to execution, and further to treat a proceeding under the section as a suit.

(BHAGWATI J.)

Jugal Kishore v. *Raw Cotton Company*, 1955 SCR 1369 : 1955 SC 376 : 1955 SCA 440 : 1955 SCJ 371 : 1955 (1) MLJ 220 : 58 Bom. LR 517 : 1955 MWN 421.

Question of Excessive Execution.

It is well settled when a sale in execution of a decree is impugned on the ground that it is not warranted by the terms thereof, that question could be agitated, when it arises between parties to the decree, only by an application under S. 47 and not in a separate suit.

1912 MWN 44 approved. (VENKATARAMA IYER J.)

Merla Ramanna v. *Nallappa Raju*, 1955 (2) SCR 938 : 1956 SC 87 : 1956 SCJ 101 : 1956 SCA 33 : 69 LW 875 : 1956 (1) MLJ 71.

Sub-lessee—Decree against lessee for possession.

A sub-lessee would be bound by a decree for possession obtained by the lessor against the lessee, no matter whether the sub-lease was created before or after the suit provided eviction is based on a ground which determines the sub-lease also.

59 Cal. 739 and 1945 Cal. 283 referred to. (MUKHERJEA J.)

Jagadguru Gurusiddhaswami v. *Dakshina Maharashtra Digambar Jain Sabha*, 1953 SC 514 : 1954 SCR 235 : 1953 SCJ 730 : 1953 SCA 1025 : 9 DLR SC 12 : 56 Bom. LR 783 : 1953 (2) MLJ 819 : 67 LW 12.

Decree imposing reciprocal obligations.

When a decree imposes obligations on both sides, which are so conditioned that performance by one is conditional on performance by the other, execution will not be ordered unless the party seeking execution not only offers to perform his side, but, when objection is raised, satisfies the executing court that he is in a position to do so.

There may, of course, be decrees where the obligations imposed on each side are distinct and severable and in such a case, each party might well be left to its own execution. But when the obligations are reciprocal and are so interlinked that they cannot be separated, any attempt to enforce performance unilaterally would be to defeat the directions in the decree. This principle is not confined to cases of decrees for specific performance.

Where a decree provided that against payment or tender by plaintiff to defendant, the defendant should execute in favour of the plaintiff a deed of transfer of certain shares; *Held*, this was not a case of two independent and severable directions in the same decree. (BOSE J.)

Jai Narain v. *Kedar Nath*, 1956 SCR 62 : 1956 SC 359 : 1956 SCA 370 : 1956 SCJ 301 : 1956 (1) MLJ 151 : 1956 BLJR 323 : 1956 ALJ 345 : 1956 Nag. LJ 452 : 1956 SCC 169 : 69 LW 841 : 35 Pat 347 : 1957 Andh LT 81.

Power of executing Court.

The executing Court has power to consider whether the defendant is in a position to perform his part of the decree. The executing court has to see that the defendant gives the plaintiff the very thing that the decree directs, and not something else, so that if there is any dispute about its indentity or substance, nobody but the Court executing the decree can determine it. (BOSE J.)

Jai Narain v. *Kedar Nath*, (*ibid*).

Proceedings under the Bengal Money Lenders Act.

A mortgage decree in execution of which the mortgagee decree-holder had purchased properties of the judgment-debtor, was reopened under S. 36 of the Bengal Money lenders Act and a fresh instalment decree was passed and the mortgagor was put back in possession of the properties. On default of the mortgagor to pay one of the instalments as per the revised decree, the decree-holder-purchaser applied for re-restoration, as provided in the revised decree. The application was dismissed and the decree-holder appealed. It was contended by the mortgagor that no appeal lay against the dismissal of the application.

Held, (negativing the contention), the application was in truth and in substance an application for execution of the new decree that had been passed in favour of the mortgagor, though the application was not couched in proper form. If it was treated as such, the order passed on such application for execution was appealable. (BHAGWATI J.)

Ashalata Debi v. *Jadu Nath*, [1954] SC 409 : 1955 (1) SCR 150 : 1954 SCJ 690 : 1954 SCA 635 : 1954 AWR 558.

Ss. 47 and 151—Order of delivery of possession without jurisdiction.

Where the executing Court ignores the provisions of the Rent Control legislation prohibiting eviction of tenants and passes an order of delivery of possession in execution of a decree the order can be set aside and an order of re-delivery to the tenant can be passed on an application under S. 47 read with S. 151. (KAPUR J.)

Patankar v. *Sastry*, 1961 SC 272 : 1961 (1) SCJ 221.

Ss. 52 and 53—applicability to compromise decrees.

Where a compromise decree fulfils the conditions of S. 52 (1) it would attract all the incidents which attach by law to a decree of that character. Consequently the decree-holder can call in aid S. 53.

It is true that S. 53, being only a rule of procedure, cannot create or take away a substantial right and that therefore, it is only when the son's liability to pay their father's debts in certain circumstances exists under Hindu Law, the operation of S. 53 is attracted and not otherwise. It is possible for the parties to a compromise decree to agree to exclude the operation of S. 53, but such exclusion cannot be inferred merely from the fact that the compromise made no reference to such right. The decree-holder cannot be said to have given up such rights, when the compromise decree was passed in favour of the plaintiff "against the estate of one B, deceased in the possession of his legal representative".

(MUKHERJEA J.)

Pannalal v. *Mt. Narain*, 1952 SC 170 : 1952 SCR 644 : 1952 SCJ 211 : 1952 (2) MLJ 83 : BLR 1952 SC 204 : 1952 MWN 442 : 7 DLR SC 313 : 1953 SCA 871 : 90 CLJ 241 : 66 LW 511.

S. 60. Contingent interest—whether attachable.

A mere contingent interest though transferable *inter vivos* is not attachable.

1939 P.C. 6 followed.

The beneficial interest of a judgment-debtor under a trust deed is attachable provided it is a vested interest, and not a contingent interest.

(JAGANNADHA DAS J)

Rajes Kanta Roy v. *Shanti Devi*, 1957 SCR 77 : 1957 S.C. 255 : 1957 SCJ 197 : 1957 SCA 440.

Arrears of salary.

Salary is not attachable to the extent provided in S. 60 (i) but there is no such exemption as regards arrears of salary. (CHANDRASEKHARA IYER J.)

Union of India v. *Hira Devi*, 1952 SC 227 : 1952 SCR 765 : 1952 SCJ 326 : 90 CLJ 795 : 1952 (2) MLJ 265 : BLR 1952 SC 261 : 1952 MWN 511 : 65 LW 628 : 7 DLR SC 330 : 1952 SCA 323.

S. 60 (1) Proviso cls. (b) and (c)—agriculturist.

The provisions of Cl. (b) in the case of an agriculturist suggest a person who tills the soil in order to maintain himself. Even if it is not necessary that a person must till the land with his own hands to come within the meaning of the word "agriculturist" he must at least show that he was really dependent for his living on tilling the soil and is unable to maintain himself otherwise.

The word agriculturist in cl. (c) must carry the same meaning as that word in cl. (b) and the house must be occupied by the agriculturist as such. (IMAM J.)

Appasaheb Tuljaram v. *Bhalchandra Vithal Rao*, 1961 SC 589.

S. 66. Suit for specific performance.

The defendants purchased the property in court auction and had entered into an agreement with the plaintiff at the time of the Court sale that they would convey it to the plaintiff for debit of a sum different from the price paid at the Court sale. In a suit for specific performance, S. 66 was pleaded as a bar. *Held*, the plea, in such a situation, could not be sustained. (MAHAJAN J.)

Gorakhram Sadhuram v. *Laxmibai*, 1953 SC 443 : 5 DLR (SC) 31.

S. 80

[No suit shall be instituted against the Government or against a public officer..... until.....two months.....after notice in writing.....stating the cause of action, the name,.....of the plaintiff and the relief which he claims;.....]

Validity of notice—requirements.

No doubt, the terms of the section should be strictly complied with. That does not however mean, the terms of the notice should be scrutinized in a pedantic manner or in a manner completely divorced from common sense. If on a fair reading of the notice, it may be said that the facts are sufficiently stated, so as to enable the Government to know what plaintiff's claim was about, and whether it should be conceded or resisted, the requirements of the section would have been complied with. (S. R. DAS C.J.)

State of Madras v. *C.P. Agencies*, 1960 SC 1309.

Difference between notice and plaint.

In a suit by a dismissed Government servant against the Government, the plaintiff had claimed in his notice reinstatement and payment of salary on the basis that he was not discharged, while in the plaint the main relief claimed was that the order of discharge was illegal. *Held*, there was no substantial difference between the two and that therefore the notice could not be said to be invalid.

1956 Ajmer 17 affirmed. (S. R. DAS C.J.)

Union of India v. *Jeewan Ram*, 1958 SC 905.

Notice—Proprietory Concern—notice not in proprietor's name—validity.

The section according to its plain meaning requires that there should be identity of the person who issues the notice with the person who brings the suit.

74 Ind App 223 Ref. to.

Hence where an individual carries on business in some name and style the notice has to be given by the individual in his own name, for the suit can only be filed in the name of the individual.

A notice was issued in the name of one D & Co. and the suit was filed by D claiming to be the sole proprietor of D & Co.

Held, the person giving the notice was not the same as the person suing and therefore the suit failed on the ground of non-compliance with S. 80.

1957 ALJ 299 and ('41) 20 Patna 394 Overruled. (WANCHOO J.)

S. N. Dutt v. *Union of India*, 1961 SC 1449.

Suit for damages for wrongful detention of chattel.

The plaintiff in his notice of suit under S. 80, claimed the return of the chattel wrongfully detained by the Government, or in the alternative a particular sum, as the price thereof. His suit against the defendant was eventually decreed, but the court passed a decree for the sum specified in the notice towards the price of the chattel, though by the date of the decree, the value of the chattel had appreciated, on the ground that the plaintiff could be awarded only the amount he had claimed in the notice. The plaintiff appealed ; *Held*, (allowing the appeal)

The plaintiff could only have demanded that sum on the date of the notice and could not sensibly have demanded any other sum ; a common sense reading of the notice would show that the requirements of the section had been complied with and that there was no defect in the same such as to disentitle the plaintiff from recovering the appreciated value as on the date of judgment.

(BHAGWATI J.)

Dhian Singh v. *Union of India*, 1958 SCR 781 : 1958 SC 274 : 1958 SCA 307 : 1958 SCJ 363 : (1958) 1 An WR 93 : (1958) 1 MLJ 93.

S. 87B—validity and scope.

S. 87B cannot be challenged as discriminatory because it arises from a classification based on historical facts. (HIDAYATULLAH J.)

Mohanlal Jain v. *H. H. Maharajah Shri Sawai Mansinghji*, 1961 (2) SCA 435.

Whether retrospective.

The prohibition contained in S. 87B affects not only a suit instituted after the enactment of S. 87B but one which, though instituted before its enactment is pending. (HIDAYATULLAH J.)

(*ibid.*)

S. 92. Public Charities—Declaratory decree.

In a suit framed under S. 92 C.P.C., the only reliefs the plaintiffs can claim and the court can grant are those enumerated therein. A relief of a declaration that the suit properties are trust properties, does not come within any of the clauses of S. 92. When the existence of the trust is denied, a declaration that it does exist

might be made ancillary to the main relief claimed under the section, if the plaintiff is held to be entitled to it ; but when the plaintiff's case fails for want of a cause of action, a declaratory relief cannot be given under S. 92. The finding as to the existence of a public trust in such circumstances would be no more than an *obiter dictum* and cannot constitute the final decision in the suit.

(MUKHERJEA J.)

Pragdasji v. *Iswarlalbai*, 1952 SCR 513 : 1952 SC 143 : BLR 1952 SC 177 : 1952 SCA 281 : 1952 MWN 437 : 54 Bom LR 540 : 1952 SCJ 224 : 7 DLR SC 282 : 66 LW 521 : 1952(2) MLJ 94 : 90 CLJ 1.

Person in *de facto* possession and management—Right to sue.

The ordinary rule that persons without title and who are mere intermeddlers cannot sue as of right, is clear. But where public trusts are concerned, courts have a duty to see that their interests and the interests of those for whose benefit they exist are safeguarded. Therefore, courts must possess the power to sustain proper proceedings by them in appropriate cases and grant relief in the interests of and for the express benefit of the trust, imposing such conditions as may be called for.

A person, who has been in *de facto* possession and management of a public trust and its properties for seven years claiming to be its trustee under a decree of Court, valid or invalid, has sufficient interest to maintain proceedings on behalf of the trust until his title is investigated in appropriate proceedings.

(JAGANNADHA DAS J.)

Vikrama Das v. *Daulat Ram*, 1956 SCA 826 : 1956 SCJ 418 : 1956 SC 382 : 1956 BLJR 416 : 1956 A11 WR 373 : (1956) All 103 : 1956 ALJ 434.

Provision in the scheme for modification—validity.

It is open in a suit under S. 92 where a scheme is to be settled to provide in the scheme for modifying it as and when necessity arises, by inserting a clause to that effect. Such a suit for the settlement of a scheme is analogous to an administration suit and so long as the modification in the scheme is for the purposes of administration such modification can be made by application under the relevant clause of the scheme, without the necessity of a suit under S. 92. Such a procedure does not violate any provision of the section. Nor can it be said that if the scheme is amended in pursuance of such a clause in the scheme it will amount to amending the decree. The insertion of such a clause for modification is not *ultra-vires*.

51 Mad 31 Overruled ; 55 Bom 414, 58 All 538, 17 CWN 841 and 1923 Patna 420 Approved.

It seems both appropriate and convenient that a scheme should contain a provision for its modification, as that would provide a speedier remedy for modification of the manner of administration when circumstances arise calling for such modification than through the cumbrous procedure of a suit.

(WANCHOO J.)

Raje Anand Rao v. *Shamrao*, 1961 SC 1206.

S. 96—who may appeal.

Where a suit in which an alienation by one defendant in favour of another is impeached is decreed and the defendants appeal from the decision but the alienor abandons it, the alienee will be entitled to prosecute the appeal to protect his rights under the alienation for his rights in no way depend upon whether the alienor chooses to stand by the alienation or not. (A. K. SARKAR. J.)

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Kirpal Kumar v. *Bachan Singh*, 1958 SCR 948 : 1958 SC 199 : 1958 SCJ 438 : (1958) Punj. 807.

Death of the plaintiff when the validity of an Act is questioned by the defendant.

In a suit, the defendant raised the question as to the *vires* of an enactment, on which the plaintiff had based his claim. The State Government was therefore made a party. That issue was tried as a preliminary issue and a finding was given. The defendant appealed, impleading the State Government as a party-Respondent. During the pendency of the appeal, the plaintiff died and the legal representatives were not brought on record. The cause title was amended, and the only parties before the appellate court were the original defendant and the State Government. It was contended that the appellant was entitled to continue the appeal against the Government and seek a decision of the appellate court as to the validity of the Act.

Held, on the death of the plaintiff, the action had abated and their could be no question of an appeal in relation thereto and therefore, the appeal was not maintainable.

1940 FCR 110 Distinguished. (VENKATARAMA IYER J.)

Syedna T. Saifuddin v. *State of Bombay*, 1958 SCR 1007 : 1958 SC 253 : 1958 SCA 431 : 1958 SCJ 403 : 1958 (1) MLJ 127 : 1958 (1) An WR 127.

S. 97—Preliminary decree against minor—non-compliance of Or. 32 R. 7—whether can be urged in appeal against final decree.

The object of enacting S. 97 was to make it clear that any party feeling aggrieved by a preliminary decree must appeal against that decree. If he fails to appeal against that decree, it would be taken to have been correctly passed and the correctness of such a decree cannot be challenged by way of an appeal against the final decree which would inevitably be limited to the points arising from proceedings taken subsequent to the preliminary decree. The whole object of S. 97 would be frustrated if it is held that in an appeal against the final decree only the factual correctness of the preliminary decree cannot be challenged but its legal validity can be even though an appeal against the preliminary decree has not been filed.

Where a preliminary decree has been passed against a minor without complying with the provisions of Or. 32 R. 7 and no appeal was filed against that decree, *held*, the invalidity of such a decree cannot be canvassed in an appeal on behalf of the minor against the final decree passed in pursuance of the said preliminary decree.

53 Pun LR 170 Affirmed ; 73 Ind App 52 Distinguished.
(GAJENDRAGADKAR J.)

Kaushalya Devi v. *Baijnath*, 1961 SC 790.

S. 100—Reappreciation of oral evidence.

Where the first appellate court has recorded definite findings in a case where the questions at issue have to be tried in the light of oral evidence and surrounding circumstances, it is not open to the High Court to attempt to reappreciate that evidence. (GAJENDRAGADKAR J.)

Raruha Singh v. *Achal Singh*, 1961 SC 1097.

Ss. 100 and 101. Erroneous finding of fact.

A High Court, on second appeal, cannot go into questions of fact, however erroneous the findings of fact recorded by the Courts of fact may be. (SINHA J.)

Parasnath Thakur v. *Smt. Mohani Dasi*, 1960 (1) SCR 271 : 1959 SC 1204 : 1961 (1) SCJ 181 : 26 Cut LT. 1.

Finding of fact by 1st appellate Court—interference in second appeal.

The High Court has no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate court based upon an appreciation of the relevant evidence. (SUBBA RAO J.)

D. Pattabhiramaswamy v. *S. Hanymayya*, 1959 SC 57 : 1958 Andh LT 834.

Inference in law from facts found.

Where the question is one of the proper inference in law to be deduced from the facts as found, the second appeallate Court is not bound by the concurrent findings of the Courts below.

54 Ind App 178 Relied on. (S. R. DAS J.)

Bejoy Gopal Mukherji v. *Pratul Chandra Ghose*, 1953 SC 153 : 1953 SCR 930 : 1953 SCJ 195 : 1953 SCA 217 : 8 DLR SC 216.

Question whether document is fictitious.

The question whether a trust deed is a fictitious transaction is essentially a question of fact. A finding of fact, even when it is an inference from other facts found on evidence is not a question of law, except in certain specified cases. (SINHA J.)

Parasnath Thakur v. *Smt. Mohani Dasi*, 1960 (1) SCR 271 : 1959 SC 1204 : 1961 (1) SCJ 181 : 26 Cut. LT 1.

Finding of fact on additional evidence.

It is true that a finding of fact, however erroneous, cannot be challenged in a second appeal, but a finding reached on the basis of additional evidence, which ought not to have been admitted and without any consideration whatever of the intrinsic and palpable defects in the nature of the entries themselves, raising serious doubts about their genuineness, cannot be accepted as a conclusive finding of fact in second appeal. (CHADRASEKHARA IYER J.)

Arjan Singh v. *Kartar Singh*, 1951 SC 193 : 64 LW 537 : 1951 SCJ 274 : 6 DLR SC 465 : 1951 (1) MLJ 556 : 1951 MWN 340 : 1951 SCR 258 : 1951 AWR 437 : 1951 ALJ 78 : BLR 1951 SC 164 : 1951 CWN 194 : 87 CLJ 243.

S. 105(2)—order of Remand—Res Judicata.

Interlocutory orders against which no appeal lies, or no appeal is taken can be challenged in appeal from the final decree or order. In cases of orders of remand, however, if an appeal lies and still no appeal is taken, they cannot be challenged in an appeal from the final decision as in the case of other interlocutory orders. The sub-section does not apply to appeals to Supreme Court, one reason being that no appeal lies to the Supreme Court from an order of remand.

The High Court after holding that S. 28 of the Calcutta Thika Tenancy Act, 1949, was applicable to a pending application by a tenant, even after the section was repealed by the Amending Act of 1953, remanded the case for disposal according to law. In an appeal to the High Court from the decision of the trial Court

after remand, the question of the applicability of S. 28 was again raised but the plea was negatived on the ground that that question was '*res judicata*' as between the parties. On appeal to the Supreme Court,

Held, (allowing the appeal), the order of remand was an interlocutory order, which did not terminate the proceedings and its correctness could be challenged in an appeal from the final order.

7 MIA 283, 10 MIA 340 and 10 MIA 431 Followed ; 11 Ind. App. 37, 11 Ind. App. 181 and 48 Ind. App. 187 Distinguished.

Principles of *Res judicata* in the same proceeding discussed. (DAS GUPTA J.)

Satyadhyan Ghosal v. *Smt. Deorajin Debi*, 1960 SC 941 : 1960 (3) SCR 590 : 1961 (1) SCA 10.

S. 109(1)(c) (before amendment of 1955)—provision is subject to Art 133(1)(c) of the Constitution.

The view that a certificate of fitness to appeal to the Supreme Court may be issued under S. 109(1)(c) even if an order is not a final order is incorrect for S. 109 is now made expressly subject to Chapter II, Part II of the Constitution and Art 133(1)(c) which occurs in that Chapter authorises the grant of a certificate only against judgments, decrees and final orders.

[Even this inconsistency between S. 109 and Art 133(1)(c) of the Constitution has now been removed by the Code of Civil Procedure (Amendment) Act, 1955.] (SHAH J.)

Jethanand & Sons v. *State of Uttar Pradesh*, 1961 SC 794.

Ss. 109 and 110. Appeals to the Supreme Court.

Questions of fact—when can be gone into.

Where the value of the claim in the trial court as well as in appeal is more than Rs. 20,000, and the judgment of the High Court reverses the decree of the trial Court, an appeal lies to the Supreme Court on both questions of fact and of law. (GAJENDRAGADKAR J.)

Keshavalal Lallubhai v. *Lalbhai Trikumlal Mills Ltd.*, 1958 SC 512 : 1958 SCJ 866 : 60 Bom LR 948 : 1959 SCR 213 : 1959 SCA 251.

Variation in costs.

A variation made by the High Court in the judgment of the trial court in the matter of costs only, does not make the decree a decree of variance. (MAHAJAN J.)

Deputy Commissioner, Hardoi v. *Ramakrishna Narain*, 1953 SC 521 : 1954 SCR 506 : 1953 SCJ 664 : 1954 SCA 1159 : 9 DLR SC 24 : 1954 ALJ 106 : (1954) 1 All 168 : 2 BLJ 53.

Concurrent findings of facts.

The Supreme Court will not generally interfere with concurrent findings of fact. (FAZL ALI J.)

Iswar Gopal v. *Pratapmal Bagaria*, 1951 SC 214 : 64 LW 525 : 1951 SCR 332 : 6 DLR SC 199 : 1951 SCJ 285 : 1951 ALJ 74 : BLR 1951 SC 183 : 2 Raj LW 305 : (1951) 2 Cal 91.

It is not the practice of the Supreme Court to set aside findings of facts concurrently arrived at by the courts below. (SARKAR J.)

Mallappa Girimallappa Betgeri v. *Yellappa Gowda*, 1959 SC 906.

Finding based on inadmissible evidence.

A concurrent finding of fact cannot be attacked in the Supreme Court, unless it can be shown that the evidence on which the courts below have rested their decision, is legally inadmissible. (BOSE J.)

Sitaji v. *Bijendra Narain*, 1954 SC 601.

When can be attacked.

The Supreme Court will not ordinarily interfere with concurrent findings of fact, unless there are exceptional circumstances. The position may be undoubtedly different, if the inference is one of law from facts admitted, or proved, or if the finding of fact is materially affected by the violation of any rule of law, or procedure. (MUKHERJEA J.)

Srinivas Ram Kumar v. *Mahabir Prasad*, 1951 SC 177 : 64 LW 544 : BLR 1951 SC 1956 : 1952 SCA 116 : 87 CLJ 236 : 1951 SCJ 261 : 6 DLR (SC) 172 : 1951 MWN 337 : 1951 ALJ 64 : 30 Pat 373.

The Supreme Court will not ordinarily interfere with concurrent findings of fact reached in the Courts below, unless they have been reached on extraneous considerations, or by violating rules of procedure, or by committing any breach of some provision of law. (MAHAJAN J.)

Nanalal v. *Bombay Life Assurance Co.*, 1950 SCR 391 : 1950 SC 172 : 1950 SCJ 337 : 52 Bom LR 745 : 5 DLR (SC) 139 : 1950 MWN 745 : 1950 Comp. Cases 179.

Assessment of damages.

The question of assessment of damages is primarily a question of fact, and the concurrent findings of the courts below on such points, except in very exceptional circumstances, are not reviewed by the Supreme Court. (MAHAJAN J.)

Trojan & Co. v. *Nagappa Chettiar*, 1953 SC 235 : 8 DLR SC 436 : 1953 SCR 789 : 1953 SCJ 345 : 1954 SCA 710 : 1953 (1) MLJ 729.

Certificate—can be supported on other grounds.

It is always open to an appellant to support the certificate on grounds other than those on which it has been granted. In such a case, the certificate will be good even though the ground on which it was granted is erroneous. (MAHAJAN J.)

Deputy Commissionner, Hardoi v. *Ramakrishna Narain*, 1953 SC 521 : 1954 SCR 506 : 1953 SCJ 664 : 1954 SCA 1159 : 9 DLR SC 24 : 1954 ALJ 106 : (1954) 1 All 168 : 2 BLJ 53.

S. 113. Reference to High Court—severability of impugned provision.

The defendant raised the question as to the validity of a provision in an enactment excluding his case from the beneficient provisions thereof, and applied to the Court to state a case. The Court held that the impugned provision was not severable from the rest of the enactment and that therefore, in any view of the question as to the validity of the impugned part, the defendant would not get

any benefit under the enactment, and that therefore, it was not necessary to decide the question to dispose of the case.

Held, the question as to the validity having been raised it had to be decided, for, the question as to the severability of the impugned provision from the rest would arise only after it had been decided that the impugned provision was invalid ; to be able to say that the impugned provision is not severable, it has first to be held that it is invalid. It cannot be said therefore, that as the impugned provision was not severable, it was not necessary for the disposal of the case to decide the question of validity. (SARKAR J.)

Ganga Pratap Singh v. *Allahabad Bank Ltd.*, 1958 SCR 1150 : 1958 SC 293 : 1959 SCA 105 : 1958 SCJ 431 : 1958 All WR 397 : 1958 (1) MLJ 156 : 1958 (1) An WR 156.

S. 115 [The High Court may call for the record of any case.....decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such .....Court.....

(a) .....exercised a jurisdiction not vested in it by law, or

(b) .....failed to exercise a jurisdiction so vested, or

(c) .....acted in the exercise of its discretion illegally or with material irregularity,

.....may make such order.....as it thinks fit.]....

Principles governing revisional jurisdiction.

The section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. It is not directed against conclusions of law, or fact, in which the question of jurisdiction is not involved, nor is it intended to authorise the High Court to interfere and correct gross and palpable errors of subordinate courts, so as to prevent grave injustice in nonappealable cases. The words "illegally" and "material irregularity" do not refer to the decision arrived at but the manner in which it is reached.

Case-law discussed. (MAHAJAN J.)

Keshardeo Chamria v. *Radha Kissen Chamria*, 1953 SC 23 : 1953 SCR 136 : 1952 SCJ 633 : 1952 SCA 775 : 8 DLR SC 54 : 1953 ALJ 101 : 1953 (1) MLJ 100 : 66 LW 188 : 1 BLJ 70.

Decision of jurisdictional fact—interference with.

If the subordinate court decides a jurisdictional fact erroneously and thereby assumes jurisdiction not vested in it, or deprives itself of jurisdiction so vested, the High Court may interefere in revision.

Where the subordinate Court decided wrongly the question whether a building was constructed after a particular date or before, on which depended the existence of jurisdiction of the Court under S. 5(4) of the U.P. (Temporary) Control of Rent and Eviction Act, 1947 to determine the inadequacy or otherwise of the reasonable annual rent fixed under section 3-A of the Act,

Held, the High Court had the power to interfere and to determine whether the question as to the date of construction was rightly or wrongly decided by the subordinate court. (KAPUR J.)

Chambe Jagadish Prasad v. *Ganga Prasad Chaturvedi*, 1959 SCJ 495 : 1959 (1) MLJ 171 : 1959 (1) An WR 171 : 1959 All WR 287 : 1959 ALJ 626 : (1959) 1 All 87 : 1959 Sup. 1 SCR 733 : 1959 SC 492.

Decision as to court fee due on plaint.

The jurisdiction in revision exercised by the High Court is strictly conditioned by clauses (a) to (c) of the section and a revision application cannot be entertained

on a question of court fee payable on a plaint at the instance of the defendant where no question of jurisdiction is involved.

38 Mys LJ 534 Not Approved. (SARKAR J.)

Rathnavarmaraja v. *Smt. Vimla*, 1961 SC 1299.

S. 141. Applicability of the Code—proceedings before Custodian of Evacuee Property.

In the case of proceedings before the Custodian of Evacuee Property, S. 141 does not apply, as the Custodian is not a Court, though the proceedings held by him are of a quasi-judicial nature. (GHULAM HASAN J.)

Ebrahim Aboobaker v. *Lal Chand Dolwani*, 1953 SC 298 : 1953 SCR 691 : 1953 SCJ 411 : 1954 SCA 1121 : 8 DLR SC 426 : 54 Bom. LR 6.

S. 144. Restitution—Principle.

The principle of the doctrine of restitution is that on the reversal of a judgment, the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost, and that it is the duty of the Court to enforce that obligation, unless it is shown that restitution would be clearly contrary to the real justice of the case. (MAHAJAN J.)

Bhagwant Singh v. *Sri Kishen Das*, 1953 SC 136 : 1953 SCR 559 : 1953 SCJ 188 : 1953 SCA 722 : 1953 ALJ 249 : (1953) (2) All. 367.

Restitution—when not granted.

A compromise decree was, on an application by the judgment-debtor under the U.P. Agriculturists' Relief Act, 1934, modified and an instalment decree for a reduced amount was passed with a condition, that in case of default of three instalments the amended decree for the whole amount would be excutable. On appeal by the decree holder, the original compromise decree was restored. During the pendency of the judgment-debtor's further appeal which was eventually allowed and by which the amended instalment decree was restored the judgment-debtor's properties had been purchased by the decree-holder in execution of the original compromise decree and taken possession of. On an application by the judgment debtor for restitution,

Held, the judgment-debtor had in any event to discharge and satisfy the decretal debt due by him either under the original decree or the amended decree, and in the absence of evidence to show that he was able to comply with the amended decree by payment of the instalments and thus to avert the sale in execution of that decree, the debt could only be discharged by the sale, and as the decree holder had not received any advantage to which he was not entitled and the judgment debtor had lost nothing, he was not entitled to restitution.

59 Cal. 647 and 1941 Pat 130 approved and applied. (MAHAJAN J.)

Bhagwant Singh v. *Sri Kishen Das*, (*ibid*).

S. 146—Devolution of interest.

During the pendency of an appeal in an execution matter before the Supreme Court, the subject-matter was mortgaged. The mortgagee filed a suit and the property was sold. *Held*, the auction-purchaser in that suit could be brought on record in the appeal pending before the Supreme Court.

1958 SC 394 Relied on. (SARKAR J.)

Shew Bux v. *Bengal Breweries Ltd.*, 1961 SC 137.

S. 146 and Or. 21 R. 16. Application by a person who claims the benefit of a decree.

There is nothing in 0. 21 R. 16 which, expressly or by necessary implication, precludes a person who claims to be entitled to the benefit of a decree under the decree-holder but does not answer the description of being the transferee of that decree by assignment in writing or by operation of law from making an application which the person from whom he claims could have made. (S. R. DAS J.)

Jugalkishore v. *Raw Cotton Co.*, 1955 SCR 1369 : 1955 SC 376 : 1955 SCA 440 : 1955 SCJ 371 : 1955 (1) MLJ 220 : 58 Bom. LR 517 : 1955 MWN 421.

S. 146 and 0. 22 R. 10—devolution pending suit—application to appellate court.

During the pendency of a suit, the defendant transferred the property in suit but the transferee did not apply to the trial court to be brought on record. Proceedings went on and the defendant filed an appeal. The transferee applied to the appellate Court under 0. 22, R. 10, to be substituted as, or in the alternative to be brought on record as additional appellant.

Held, though Or. 22 R. 10 did not apply as the transfer was made prior to the filing of the appeal and not during its pendency, the application fell within S. 146 and the applicant was entitled to be brought on record ; for, the expression in S. 146, "claiming under" is wide enough to include cases of devolution and assignment mentioned in Or. 22 R. 10. It cannot be contended that S. 146 authorises only the initiation of any proceeding and that therefore the applicant, not having filed the appeal, was not entitled to be impleaded to continue the appeal filed by the transferor, for the right to file an appeal carries with it the right to continue an appeal filed by the person under whom the applicant claims.

1955 (1) SCR 1369 Relied on. (VENKATARAMA IYER J.)

Sailabala Dassi v. *Nirmala Sundari Dassi*, 1958 SCR 1287 : 1958 SC 394 : 1958 SCJ 743 : 1959 SCA 129 : 1958 Nag LJ 385 : 1958 MPLJ 473 : (1958) 2 An WR 99 : (1958) 2 MLJ 99 : 1959 Pat LR 27.

Ss. 148 & 151—Jurisdiction of Court.

Orders fixing time peremptorily for a future happening which leave the Court powerless to deal with events that might arise in between, turn out, often enough, to be inexpedient. Such procedural orders, though peremptory, (conditional decrees apart) are, in essence, *in terrorem* so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed. (HIDAYATULLAH J.)

Mahanth Ram Das v. *Ganga Das*, 1961 SC 882.

Ss. 148, 149 & 151—Extension of time after expiry of time fixed.

A Division Bench of the High Court allowed an appeal on condition that the appellant paid the deficit court fee within a specified time and directed that the appeal would stand dismissed if the amount was not paid within the time given. On the last day before the time granted expired the appellant applied for an extension of time. No Division Bench was sitting on that date and the application which came up after the expiry of the time granted originally was dismissed on the ground that the appeal had already stood dismissed due to non-payment

within the time given. Thereafter the appellant filed an application under S. 151 which was also rejected.

Held, the High Court had erred on both the occasions and that time should have been extended, if sufficient cause was made out, first when the application filed within time was before it and again under the exercise of its inherent powers, when the petition under S. 151 was filed. If the High Court had felt disposed to take action on any of the two occasions, Ss. 148 and 149 would have clothed them with ample power to do justice, for cases are known in which courts have moulded their practice to meet a situation like this and to have restored a suit or proceeding even though a final order had been passed.

1956 Patna 20 Reversed ; 1954 BLJR 600 Disapproved ; 4 Patna 61 (PC) Relied on. (HIDAYATULLAH J.)

Mahanth Ram Das v. *Ganga Das*, 1961 SC 882.

[**Note :** In the instant case the Supreme Court, instead of sending back the case for trial of the petition, perused the application and the affidavit and, being satisfied that sufficient cause had been made out, granted further time to the appellant for payment of the deficit court fee.]

S. 149—discretion of Court.

The powers of the High Court to allow an amendment and to grant time to pay the requisite court fee under S. 149 is clearly one under which the plea of the bar of limitation can be ignored and it is a matter of discretion. If there are no materials to indicate that it was exercised so as to violate any recognised principles of law, or that by granting leave to amend, any gross injustice has been done, the Supreme Court will not interfere with the discretion so exercised. (KANIA C. J.)

Mahasay Ganesh Prasad Ray v. *Narendra Nath Sen*, 1953 SC 431 : 1951 Ker LT 28 : 17 CLT 73.

S. 151—Appeal against order under.

An order under S. 151 simpliciter is not appealable, as it is not included in the category of appealable orders mentioned in Section 104 and Order 43 Rule 1.

1924 Mad. 778 Doubted.

When on the day fixed for the hearing of the execution petition, the decree-holder applied for time to take necessary steps, the Court rejected the petition for extension of time and by the same order dismissed the execution petition for default, and on an application of the decree-holder for restoration, the Court after hearing the objections of the respondent ordered restoration on the ground that the dismissal of the execution petition without giving an apportunity to his pleader to make any submission he might have to make after rejection of the petition for time had resulted in an injustice to the decree-holder and that S. 151 empowered the Court to rectify the said omission.

Held, no appeal lay from such an order, as it did not amount to a final determination of any question relating to execution, discharge or satisfaction of a decree and so did not fall within the ambit of S. 47.

Nor was a revision competent against such an order ; for the judge had jurisdiction to correct his own error without entering into a discussion of the grounds taken by the decree-holder or the objections raised by the judgment-debtor ; nor could it be said that in the exercise of it, he acted with material irregularity or committed any breach of the procedure laid down for reaching the result. (MAHAJAN J.)

Keshardeo Chamria v. *Radha Kissen Chamria*, 1953 SC 23 : 1953 SCR 136 : 1952 SCJ 633 : 1952 SCA 775 : 8 DLR SC 54 : 1953 ALJ 101 : 1953 (1) MLJ 100 : 66 LW 188 : 1 BLJ 70.

Power to appoint a commissioner to seize account books.

The court has no inherent power to pass an order appointing a commissioner to seize the plaintiff's account books upon the application of the defendant on the ground that the plaintiff would fabricate his books of account.

1959 All 707 Reversed. (RAGHUBAR DAYAL J.)

Padam Sen v. *State of Uttar Pradesh*, 1961 SC 218.

S. 152—Nature of proceedings under.

There is no warrant for the view that an amendment application is a continuation of the suit or proceedings therein. It is in the nature of an independent proceeding, though connected with the order of which amendment is sought. Such a proceeding is governed by the law prevailing on its date.

(CHANDRASEKHARA IYER J.)

Ganpatrai Hiralal v. *Aggarwal Chamber of Commerce*, 1952 SC 409 : 1953 SCR 752 : 1952 SCJ 564 : 1953 SCA 1 : 7 DLR SC 491 : 66 LW 1.

S. 153 and Or. I R. 10—Suit by foreign firm.

If persons doing business as partners outside India do file a plaint in the name of their firm they are misdescribing themselves. The plaint is not a nullity. It is a plaint with a defective description. In such circumstances the Court can permit under S. 153 an amendment to enable a proper description of the plaintiffs to appear in it. Order I Rule 10 has no application to such a case.

1928 Bom. 191 Overruled ; (1955) Madras 1293 (dissenting from 1931 Cal. 770 & 1935 Rang 240) Approved ; 1960 Cal. 15 Affirmed. (IMAM J.)

Purushottam Umedbhai v. *Manilal & Sons*, 1961 SC 325.

THE FIRST SCHEDULE : Order I Rule 10

[.....

(2) The Court may at any stage.....either upon or without the application of either party, and on such terms as may.....be just, order.....name of any party improperly joined.....be struck out and.....any person who ought to have been joined whether as plaintiff or defendant or whose presence.....may be necessary.....effectually and completely to adjudicate upon.....all the questions involved in the suit, be added :

.....]

Suit for declaration of status.

The question of addition of parties under Or. I R. 10 is generally not one of initial jurisdiction but a judicial discretion but in some cases it may be one of jurisdiction in the limited sense of S. 115 C.P.C. In a suit relating to property in order that a person may be added as a party he should have direct and not merely commercial interest in the subject matter. Where the suit is for a declaration as regards status or legal character the rule of present or direct interest may be relaxed in a suitable case where the court is of the opinion that by adding that party it would be in a better position effectually and completely to adjudicate upon the controversy.

In a suit for a declaration that the plaintiff was the lawfully wedded wife of the defendant and was entitled to receive *Kharch-e-pandan* from the defendant

every month, 2 other persons claiming to be the wife and son respectively of the defendant and disputing the plaintiff's status applied to be added as parties. The application was opposed by the plaintiff on the ground (1) that the applicants had no present interest in the suit, the parties being Muslims, and the applicants had only an expectancy of succession to the defendant, (2) their presence was not necessary for adjudicating on the matters in issue, the defendant himself having admitted in his written statement the plaintiff's claim and (3) any decision in the suit would not under Section 43 of the Specific Relief Act be binding on the applicants. The trial court overruled the objection and impleaded the applicants. A revision to the High Court was dismissed. In appeal by the plaintiff to the Supreme Court, *held*, (dismissing the appeal) :

If the plaintiff had herself impleaded the applicants as defendants on the ground that they were interested to deny the plaintiff's status the latter could not have been discharged as unnecessary parties and that no cause of action had been disclosed against them. The adjudication of status is a serious matter and affects not merely parties but also the plaintiff's progeny (not before the Court) and the privies by blood of the parties such as the applicants and that therefore the rule of present interest evolved by case-law does not apply with full force. The Court was not bound to grant the discretionary relief of declaration as to status merely because the defendant admits the claim and if the Court insists upon clear proof of even admitted facts which it is entitled to do under Or. 8 R 5, it cannot be said to have exceeded its judicial powers. The rule laid down in S. 43 of the Specific Relief Act is not exactly a rule of *Res Judicata*. It is wider in one sense, for no question of competency of the former Court to decide the later controversy can arise in the case of S. 43 and is narrower in another sense. Under the section the decision will bind not only the parties but also their privies, not privies in the restricted sense, that is privies-in-estate, but also privies-in-blood. In the circumstances therefore the exercise of discretion by the trial court in directing the applicants to be impleaded could not be said to be unsound. (SINHA J.)

Razia Begum v. *Sahebzadi Anwar Begum*, 1959 SCR 1111 : 1958 SC 886 : 1959 SCA 46 : 1958 SCJ 1214 : (1958) 2 MLJ 193 : (1958) 2 An WR 193.

Trust suits.

In a suit for a declaration that a temple, the Deity therein and the plaint properties are the private properties of the plaintiff, the Deity is a necessary party and unless the Deity is impleaded any declaration given against its interests will not bind it even though the Hindu community as such (represented by some of the defendants under Or I R. 8) may be bound. Where the Deity is not impleaded, the suit must fail. The Deity cannot be impleaded at the late stage of appeal before the Supreme Court. (HIDAYATULLAH J.)

Narayan v. *Gopal*, 1960 (1) SCR 773 : 1960 SC 100 : 1960 SCJ 263 : 1960 (2) SCA 153.

Or. II R. 4—Joinder of claim for redemption and claim for partition and possession.

So long as no question of limitation is involved, there is no objection to a claim for redemption and one for partition and possession being joined together in the same suit by one mortgagor against the other who alone has redeemed the mortgaged property belonging to their joint family.

1959 E.P 254 Affirmed. (CHANDRASEKHARA IYER J.)

Ganeshi Lal v. *Jyoti Pershad*, 1953 SC 1 : 1953 SCR 243 : 1952 SCJ 649 : 1953 SCA 339 : 8 DLR SC 67 : 94 CLJ 137 : 66 LW 183.

O. VI R. 2—Variance between pleading and proof.

Where the parties go to trial with full knowledge that a particular question (e.g. applicability of the doctrine of *lis pendens*) is in issue though no specific issue is framed thereon, and avail themselves of the opportunity to adduce their evidence thereon, the absence of a specific pleading on the question in the circumstances is a mere irregularity, not resulting in any prejudice to them.

34 Ind. App. 27 Applied.

The true scope of the rule laid down in 1930 P.C 57 that 'no amount of evidence can be looked into upon a plea which was never put forward' is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. (VENKATARAMA IYER J.)

Nagubai v. *Shama Rao*, 1956 SCR 451 : 1956 SC 593 : 1956 SCA 959 : 1956 SCJ 955 : 1956 SCC 321 : (1956) Mys 152 : 1956 An LT 1029.

Relief not prayed for—grant of.

The decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint the Court is not entitled to grant a relief not asked for. (MAHAJAN J.)

Trojan & Co. v. *Nagappa Chettiar*, 1953 SC 235 : 1953 SCR 789 : 1953 SCJ 345 : 1954 SCA 710 : 8 DLR SC 436 : 1953 (1) MLJ 729.

Absence of specific pleading.

Where the facts from which an inference of resettlement in favour of the plaintiff had been drawn by the courts below were alleged in the plaint, *held*, the absence of a specific pleading as to resettlement, in the circumstances was immaterial and that relief could be granted to the plaintiff to the extent he was able to establish it. (MAHAJAN J.)

Gunendra Nath Mitra v. *Satish Chandra Hui*, 1953 SC 42 : 1953 SCJ 6 : 1953 SCR 277 : 1953 SCA 977.

R. 4—particulars in the case of fraud etc.

It is true that fraud, coercion and undue influence may overlap in part in some cases but they are separate and separable categories in law and must be separately pleaded. In the case of fraud, undue influence or coercion the parties pleading it must set forth full particulars and the case must be decided only on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud, undue influence or coercion, in however strong language they may be couched.

In the case of coercion grounded on the allegation that a person was threatened with death it is necessary to know the nature of the threat, who administered it, the date, time, place and circumstances in which it was administered. Otherwise it will be impossible to reach a proper conclusion. (BOSE J.)

Bishundeo v. *Seogeni Rai*, 1951 SC 280 : 1951 SCR 548 : 1952 SCJ 413 : BLR 1951 SC 257 : 6 DLR (SC) 255 : 1952 SCA 388 : 1951 ALJ 127 : 89 CLJ 73 : 64 LW 971 : 30 Pat 947.

Or. VI R. 8 and Or. VIII R. 2—Validity of contract.

Or. 6 R. 8 and Or. 8 R. 2 leave no doubt that a party denying merely the factum of a contract and not alleging its unenforceability in law must be held bound by the pleadings and be precluded from raising the legality or validity of the contract.

In a suit for specific performance of a contract against the Government, no defence was raised that the contract was not enforceable because it was not executed as required by S. 30 of the Government of India Act, 1915. The plaintiff had had no opportunity of adducing evidence upon this question and despite the best efforts of the plaintiff the Government withheld production of relevant material ;

Held, the appellate Court was not justified in allowing this question to be raised for the first time at the time of the arguments. Nor was it correct to say that it was a pure point of law.

1952 Patna 393 Reversed. (GHULAM HASAN J.)

Kalyanpur Lime Works v. *State of Bihar*, 1954 SC 165 : 1954 SCR 958 : 1954 SCJ 99 : 1954 SCA 278 : 9DLR SC 211 : 1954 (1) MLJ 305.

O. VI R. 15—defective verification—duty of Court.

See Bhikaji Kesheo v. *Brijlal Nandlal*, 1955 SC 610.

O. VI R. 15(2)—enumeration of paragraphs based on information.

Where the allegations in a pleading purport to be based only on information and the verification clause refers to the entirety of the pleading, the absence of enumeration of the various paragraphs therein as having been based on information cannot be considered to be a defect. (JAGANNADHA DAS J.)

Bhikaji Kesheo v. *Brijlal Nandlal*, (*ibid*).

O. VI R. 17 [The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.]

Principles to be followed.

All amendments should be allowed which satisfy the conditions (a) of not working injustice to the other side and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. It should be refused only when the other party cannot be placed in the same position as if the pleading had originally been correct but the amendment would cause him an injury which cannot be compensated in costs. Thus when a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit has become barred by limitation, the amendment should be refused. Otherwise the defendant would be deprived of a good defence to the action which injury cannot be compensated by costs. The ultimate test therefore still remains the same :—Can the amendment be allowed without injustice to the other side or not ?

Observation of BATCHELOR J. in 33 Bom 644 at p. 655 Approved.

Held in the instant case that an amendment of the plaint in a suit under Or. 21, R. 103 of the Civil Procedure Code seeking to give further and better particulars of the claim made in the plaint, but not introducing a new case and which did not take the defendant by surprise, was rightly allowed by the Court below.

(S. K. DAS J.)

Pirgonda H. Patil v. *Kalgonda S. Patil*, 1957 SCR 595 : 1957 SC 363 : 1957 SCA 329 : 1957 SCJ 371 : 59 Bom LR 401 : 1957 SCC 264.

Plea of limitation and exercise of discretion.

The Courts will as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether the amendment should be ordered and does not affect the power of the Court to order it.
(VENKATARAMA IYER J.)

Leach & Co. Ltd. v. *Jardine Skinner*, 1959 SCR 438 : 1957 SC 357 : 1957 SCA 318 : 1957 SCJ 313 : 1957 All WR 779 : 1957 BLJR 750 : 59 Bom LR 395 : 1957 MPLJ 497 : 1957 Nag LJ 321 : 1957 SCC 237 : 1957 MPC 583 : 1957 ALJ 794.

Discretion when not to be exercised.

An election petition was filed on the last day of the prescribed period containing only the bare bones of a charge under S. 123 (8) of the Representation of the People Act without giving any particulars. The petitioner subsequently filed a replication seeking to weave the allegations about the particulars into the fabric of his petition but the result was a mere patch work. After a long time when arguments were being heard on a preliminary issue raised by the respondent, the petitioner filed an application for amendment of the petition by giving the particulars of the charges. The tribunal allowed the amendment.

Held, the Tribunal in permitting the amendment did not under the circumstances exercise a sound and judicial discretion in the matter.
(VENKATARAMA IYER J.)

Harish Chandra Bajpai v. *Triloki Singh*, 1957 SCR 370 : 1957 SC 444 : 1957 SCA 616 : 1957 SCJ 297.

At any stage—amendment in appellate Court.

Where all the necessary allegations had been made and the requisite pleas taken by the plaintiff and an issue was framed and the necessary evidence was led by the parties, the appellate court would be justified in allowing the amendment of the plaint by the addition of a prayer in the prayer clause. (KAPUR J.)

Lakshminarasimhachari v. *Sri Agastheeswaraswamy*, 1960 (2) SCR 768 : 1960 SC 622 : 1960 SCJ 954 : 1960 (2) MLJ 61 : 1960 (2) Andh. WR 61.

Application in appellate Court—Procedure.

Though the plaintiff did not ask for a particular relief in the proper form, the facts on which a relief in proper form could be given had been set out. The necessary amendment was accordingly of a purely formal character. The appellate Court while allowing the application decided that the defendant would be entitled to file a supplementary written statement and therefore remanded the matter for further disposal of the matter in accordance with the law.

Held, the order of remand was erroneous, the appellate Court should, if it felt that there was any need for a reply by the defendant, itself have called for a reply and then should have determined whether, and if so, how far, further proceedings were called for. (BOSE J.)

Gopal Krishnaji Ketkar v. *Mahomed Jaffar*, 1954 SC 5 : 1953 SCJ 621.

Amendment of valuation of suit.

Where in a suit falling under S. 8 of the Suits Valuation Act, 1887, the plaintiff, being entitled under the provisions of the Court Fees Act, 1870, to fix his own

valuation for purposes of court fees omits to do so, attempting to obtain the benefit of a fixed court fee, but states a value for purposes of jurisdiction alone, it will be unreasonable to take that valuation as the valuation for purposes of of court fees also. In such a case liberty should be given to the plaintiff to amend his plaint and state specifically the amount at which he seeks to value his claim for purposes of court fees and such value will determine the value for jurisdiction also.

1949 Lah 116 Approved. (GAJENDRAGADKAR J.)

Sathappa Chettiar v. *Ramanathan Chettiar*, 1958 SCR 1021 : 1958 SC 245 : 1958 SCJ 407 : 1958 (1) MLJ 148 : 1958 (1) An WR 148.

O. VII R. 7. Alternative case not pleaded but admitted by defendant.

A plaintiff may rely on different rights alternatively and there is nothing in the Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative.

The Court cannot grant relief to the plaintiff on a case not found in the pleadings and which the other side was not called upon or had not an opportunity to meet. But when the alternative case which the plaintiff could have made was not only admitted by the defendant but was expressly put forward as an answer to the plaintiff's claim there will be nothing improper in giving the plaintiff a decree upon the case made by the defendant. There is no surprise caused to the defendant and there is no question of adducing further evidence on these facts as they were expressly admitted by him. When thus no injustice can possibly result to the defendant it may not be proper to drive the plaintiff to a separate suit.

Where in a suit for specific performance of an agreement to sell the plaintiff alleges that he has paid a certain sum towards the sale price and the defendant while denying the agreement admits the receipt of the sum and alleges it as having been taken as a loan, the court may, if the plaintiff fails to prove the contract, grant a decree to the plaintiff for the sum admitted to have been received by the defendant even though the plaintiff has not claimed such a relief in his pleading even in the alternative. (MUKHERJEA J.)

Srinivas Ramkumar v. *Mahabir Prasad*, 1951 SC 177 : 64 LW 544 : 1951 SCJ 261 : 6 DLR (SC) 172 : 1951 MWN 327 : 1951 ALJ 64 : 30 Pat 373 : BLR 1951 SC 156 : 1952 SCA 116 : 87 CLJ 236.

O. VIII R. 6. Equitable set-off—availability.

A plea in the nature of an equitable set off is not available when the cross demands do not arise out of the same transaction. (MAHAJAN J.)

Bhupendra Narain Singh Bahadur v. *Bahadur Singh*, 1952 SC 201 : 1952 SCR 782 : 1952 SCJ 269 : BLR 1952 SC 235 : 7 DLR SC 348 : 1953 SCA 143.

R. 10—Failure to file written statement.

What the consequences entailed by O. 8 R. 10 should be in a given case is for the court, in the exercise of its judicial discretion, to determine. No hard and fast rule can be laid down. In some cases, an order awarding costs to the plaintiff would meet the ends of justice or a written statement can be considered on the spot and issues framed. In other cases the ends of justice may call for more drastic action. (BOSE J.)

Sangram Singh v. *Election Tribunal, Kotah*, 1955(2) SCR 1 : 1955 SC 425 : 1955 SCA 545 : 1955 SCJ 431 : 1955(2) MLJ 3 : 1955 MWN 844 : 69 LW 1 : 10 Ele. LR 293.

O. IX R. 6—*Exparte* order.

The first hearing can be either for settlement of issues only or for final disposal of the suit. If it is only for the settlement of issues, then the Court cannot pass an *exparte* decree on that date because of the proviso to O. 15 R. 3 (1) which provides that that can only be done when "the parties or their pleaders are present and none of them objects." If it is for final hearing, an *exparte* decree can be passed, and if it is passed, then O. 9 R. 13 comes into play.

Exparte merely means in the absence of the other party. When the defendant has been served and has been afforded an opportunity of appearing, then, if he does not appear, the court may proceed in his absence which means that it can proceed without a written statement. But the court is not directed to make an *exparte* order. The fact that it is proceeding *exparte* will be recorded in the minutes of its proceedings but that is merely a statement of the fact and is not an order made against the defendant in the sense of an *exparte* decree or other *exparte* order which the Court is authorised to make. (BOSE J.)

Sangram Singh v. *Election Tribunal, Kotah*, (*ibid.*).

Applicability to subsequent hearings.

Order IX Rule 6(1)(a) is confined to the first hearing of the suit and does not *per se* apply to subsequent hearings.

51 Ind. App. 233 Relied on. (BOSE J.)

Sangram Singh v. *Election Tribunal, Kotah*, (*ibid.*).

R. 7—*Exparte* order.

Rule 7 does not require the setting aside of what is commonly, though erroneously, known as 'the *exparte* order'. No *exparte* order is contemplated by the Code and therefore no order to set aside that order is contemplated either.

Rule 7 cannot be read to mean that the defendant cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared. (BOSE J.)

(*ibid*).

O. IX R. 7 and O. XVII R. 2.

If the defendant does not appear at the adjourned hearing (irrespective of whether or not he appeared at the first hearing) Or. 17, R. 2 applies and the Court is given the widest possible discretion which it must exercise. Its hands are not tied by the so called *exparte* order, and if it thinks they are tied by 0. 9 R. 7 then it is not exercising the discretion which the law says it should, and, in a given case, interference may be called for. (BOSE J.)

(*ibid.*).

O. XIV R. 1(5)—Plea of fraud etc.,—ascertainment.

Where in a suit on accounts the defendant alleges that he signed the account book on being threatened by one of the plaintiffs that he would institute a suit and that the other plaintiff would be angry with him and on being assured that no suit would be instituted he signed the account without looking into it etc., it is the duty of the Court to examine the parties and find out the precise nature of the plea involved within those facts ; in other words, whether the defendants wished to plead in defence fraud, coercion, undue influence or a mistake of fact entitling them to reopen the accounts. (MAHAJAN J.)

Hiralal v. *Badkulal*, 1953 SC 225 : 1953 SCR 758 : 1953 SCJ 315 : 1953 SCA 499 : 8 DLR SC 432 : 1953 (1) MLJ 725 : 66 LW 545.

O. XVII R. 2—Further participation.

If a party does not appear on "the day to which the hearing of the suit is adjourned", he cannot be stopped from participating in the proceedings simply because he did not appear on the first or some other hearing. But he must accept all that has gone before and be content to proceed from the stage at which he comes in, unless he can show good cause for his previous non-appearance. (Bose J.)

Sangram Singh v. *Election Tribunal, Kotah*, 1955 (2) SCR 1 : 1955 SC 425 : 1955 SCA 545 : 1955 SCJ 431 : 1955 (2) MLJ 3 : 1955 MWN 844 : 69 LW 1 : 10 Ele. LR 293.

O. XX R. 12—Absence of prayer for mesne profits.

Where there was no prayer for mesne profits as such and the plaintiff had claimed "possession of the property together with all the rights appertaining thereto", *held*, the claim for mesne profits was not included in this expression and cannot be granted. (Bhagwati J.)

Mohd. Amin v. *Vakil Ahmed*, 1952 SC 358 : 1952 SCR 133 : 1952 SCJ 539 : 1953 (1) MLJ 6 : 8 DLR SC 6 : 1953 SCA 245 : 1953 ALJ 4 : 66 LW 3 : 1 BLJ 25.

R. 14—Non-deposit within specified time.

A decree for pre-emption was passed in favour of the plaintiff and he was ordered to deposit the sale price within a specified time from the date of the decree. An appeal against the decree was withdrawn. The plaintiff applied to the Court for making the deposit after the expiry of the time specified.

Held, the suit stood dismissed by reason of non-deposit within the specified time, as the mere filing of an appeal does not suspend the trial court decree and unless that decree is altered in any manner by the appellate Court, the pre-emptor is bound to comply with the decree of the trial court. In such cases, the dismissal is as a result of the mandatory provisions of Rule 14 and an omission to incorporate in the decree a direction that if the deposit is not made within the time fixed, the suit would be dismissed could not in any way affect the rights of the parties. (Mahajan J.)

Naguba Appa v. *Namdev*, 1954 SC 50 : (1953) Hyd. 455 (Hyderabad Bench).

O. XXI R. 2—Nature of proceedings under.

The certification by the decree-holder of the satisfaction of the decree, even if it is in the form of an application, is not a proceeding in execution of the decree.

1949 Cal 266 Affirmed. (Das J.)

Pashupathinath Malia v. *Deba Prosanna*, 1951 SCR 572 : 1951 SC 447 : 1951 SCJ 506 : 7 DLR (SC) 16 : BLR 1951 SC 439.

R. 11—Non-compliance.

An application for execution purporting to be under Or. 21 R. 11 was defective but no objection was taken before the executing Court or at any later stage of the proceedings. But subsequently another application rectifying the defect was presented. *Held*, in the circumstances that the objection as to non-

compliance with the provisions of Or. 21 R. 11 taken in appeal before the Supreme Court cannot be sustained.

Jugal Kishore v. *Raw Cotton Co.*, 1955 SCR 1369 : 1955 SC 376 : 1955 SCA 440 : 1955 SCJ 371 : 1955 (1) MLJ 220 : 58 Bom. LR 517 : 1955 MWN 421.

R. 16—"by operation of law".

The transfers 'by operation of law' are not intended by the rule to be confined to the three cases of death, devolution or succession. There is no warrant for confining transfers 'by operation of law' to transfers by operation of statutory laws. When a Hindu or Mohammadan dies intestate and his heirs succeed to his estate there is a transfer not by any statute but by the operation of their respective personal law. In order to constitute a transfer of property 'by operation of law' all that is necessary is that there must be a parting of one person's rights in the property to another person by the force of some law, statutory or otherwise.

57 Bom 513, 1936 Mad 543, (1939) Bom 271 Not Approved. (S. R. DAS J.)

(NOTE :—The two other learned judges expressed no opinion on the question.)

Jugal Kishore v. *Raw Cotton Co., Ltd.*, (*ibid*).

R. 16 and S. 146—Transfer of debt in suit—effect.

During the pendency of a suit for recovery of a debt, the plaintiff executed a document in favour of a third party transferring all the book and other debts due to the plaintiff but no specific mention was made of the pending suit. The transferee did not get impleaded in the suit under Or. 22 R.10. The suit proceeded and a decree was passed in favour of the original plaintiff. The transferee applied for execution of the decree.

Held, he could execute the decree by virtue of the provisions of S. 146 as a person claiming under the plaintiff even though he may not be a transferee by assignment in writing or by operation of law. (*per Curiam*)

Case Law discussed. The decisions in 17 Mad. LJ 391 ; 1956 Mad 1202 ; 51 Cal. 703 and 59 Cal. 297 holding that in such circumstances the transferee is not entitled to execute the decree impliedly overruled.

(NOTE :—In this case the Bench consisted of S. R. DAS, N. H. BHAGWATI and S. J. IMAM JJ. DAS J. held that the transferee was neither a transferee by assignment in writing nor a transferee by operation of law, within the meaning of Or. 21, R. 16 but that the transferee was entitled to execute the decree by virtue of the provisions of S. 146. BHAGWATI J. while he agreed with this also held that the transfer in question was a transfer by assignment in writing within the meaning of Or. 21, R. 16. IMAM J. held that the application was competent under S. 146.)

Jugal Kishore v. *Raw Cotton Co. Ltd.*, (*ibid*).

R. 32(1)—Remedy under—when available.

The remedy provided in 0. 21, R. 32(1) is one of the remedies available in execution of a decree for specific performance but it can only be used by a person who is entitled to execute the decree, and if, by reason of his own incapacity to perform his part, he is precluded from seeking execution, O.21, R.32(1) cannot apply. (BOSE J.)

Jai Narain v. *Kedar Nath*, 1956 SCR 62 : 1956 SC 359 : 1956 ALJ 345 ;

1956 SCA 370 : 1956 SCJ 301 : 1956 (1) MLJ 151 : 1956 BLJR 323 : 1956 Nag LJ 452 : 1956 SCC 169 : 69 LW 841 : 35 Pat 347 : 1957 Andh LT 81.

R. 35—D-Hr. accepting possession with defendant remaining on premises.

Where the decree-holder accepts delivery of possession with defendant remaining on the premises with his persmission and grants a receipt acknowledging full delivery of possession, the decree would have been fully executed and cannot be executed any more.

1931 Cal 427 Approved. (SARKAR J.)

Shew Bux v. *Bengal Breweries*, 1961 SC 137.

R. 50—Decree against firm—execution against partner.

In a suit for recovery of money against a firm, the partners were also impleaded and a decree was passed in the following terms :—"decreed for the sum of.....against the defendant No. 1 (the firm).....and any such property of the firm as may be found in the hands of defendants 2 to 6 (the partners individually)".

Held, a reasonable interpretation of the decree would be that the first part of the decree was against the firm and second part confined its operation to the assets of the firm in the hands of its partners. At the worst the decree could be said to be ambiguous and therefore for the purpose of interpreting the decree the pleadings and the judgment could be looked into. *Held* also that it was manifest from the judgment that the personal decree asked for against the partners was refused for specified reasons and that therefore the decree that was actually passed could not be executed personally against the partners.

1953 A11 710 Affirmed. (SUBBA RAO J.)

Topanmal Chotamal v. *Kundomal Gangaram*, 1960 SC 388.

R. 57 (as amended in Calcutta)—continuation of attachment—effect.

Where the court while finally dismissing the execution petition, directs under R. 57 that attachment should continue, the execution cannot be deemed to be pending.

1949 Cal. 266 Affirmed. (S. R. DAS J.)

Pashupathinath Malia v. *Deba Prosanna*, 1951 SC 447 : 1951 SCR 572 : 1951 SCJ 506 : BLR 1951 SC 439 : 7 DLR (SC) 16.

R. 72(2) and R. 85—Third Party purchaser—set off.

The inherent powers of the court cannot be invoked to allow a set-off in execution proceedings apart from the provisions of Or. 21, R. 19 circumventing mandatory provisions of the Code and to relieve a third party purchaser of his obligation to make the deposit.

Where the third party purchaser happened to be a mortgagee of the properties but had not obtained a decree thereon, *held*, he cannot be allowed to set off his mortgage claim against the purchase money to be deposited by him.

(GHULAM HASAN J.)

Manilal Mohanlal Shah v. *Sardar Sayeed Ahmed*, 1954 SC 349 : 1955 (1) SCR 108 : 1954 SCJ 509 : 1954 SCA 646 : 1954 And LJ SC 64 : 57 Bom. LR 10 ; 1954 (2) MLJ 55 : 67 LW 632.

Rr. 84, 85 & 86—Third Party purchaser.

The provisions requiring the deposit of 25 p.c. of the purchase money immediately on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon non-compliance with these provisions, there is no sale at all. When there is no sale, there can be no question of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the court is bound to resell the property in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law. There is no sale and the purchasers acquire no right at all.

16 Cal. 33 Overruled ; observation in 1931 Lah 15 Disapproved.
(GHULAM HASAN J.)

Manilal Mohanlal v. *Sayeed Ahmed*, (*ibid*).

R. 89—Sales by Receivers—applicability.

The provisions of Or. 21 R. 89 do not apply to sales held by Receivers appointed by the Court and authorised to sell the property in question.
(GAJENDRAGADKAR J.)

Jibon Krishna Mukherjee v. *New Bheerbhum Coal Co.*, 1960 (2) SCR 198 : 1960 SC 297 : 1960 SCJ 338 : 1960 (1) SCA 388 : 1960 (1) MLJ 96 : 1960 (1) Andh. WR 96.

Rules 90 and 92—Finality.

In cases where there has been an appeal from an order refusing to set aside a sale under Or. 21 R. 90, there is no finality until the matter is finally disposed of by the appellate Court.

1934 PC 134 Relied on. (FAZL ALI J.)

Ramkrishna Rao v. *Kandokori Chellayamma*, 1953 SC 425 : 1950 SCR 806.

R. 94—Decree against Hindu father.

In execution of a money decree against a Hindu father, where the right, title and interest of the judgment-debtor are put up for sale, what passes to the auction purchaser is a question of fact in each case dependent upon what was the estate put up for sale, what the court intended to sell and what the purchaser intended to buy and did buy and what he paid for. (KAPUR J.)

S. M. Jakati v. *S. M. Borkar*, 61 Bom LR 688 : 1959 SCJ 719 : 59 CLJ 81 : 1959 (2) MLJ 21 : 1959 SCR 1384 : 1959 SC 282.

O. XXII R. 1. [The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.]

Suit for partition by next friend of Hindu minor—whether abates.

A suit for partition on behalf of a Hindu minor effects a severance in status from the date of the suit, conditional on the Court holding that its institution was for the benefit of the minor. When therefore the minor dies during the pendency of the suit, the suit does not abate and the legal representative of the minor is entitled to continue the action as in the case of suits by adult co-parceners, with this difference that if the suit is held by the Court not to have been instituted for

the benefit of the minor it is liable to be dismissed and no severance in status results from such an action. The maxim *actio personalis moritur cum persona* which applies only to actions for damages for personal wrongs does not apply to the case as the suit is one for property.

57 Mad 95 and (1957) Nag 848 Approved. (VENKATARAMA IYER J.)

Kakkumanu Peddasubbayya v. *Kakkumanu Akkamma*, 1958 SC 1042 : 1959 SCA 19 : 1959 SCJ 138 : 1959 (1) MLJ 60 : 1959(1) An WR 60 : 1959 SCR 1249.

Rr. 4 and 11—Effect of death of one of the respondents in appeal.

The Court's power to deal with matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent— See *State of Punjab* v. *Nathuram*, 1961 (2) SCJ 637.

R. 6—Applicability to proceedings before Custodian of Evacuee Property.

The principle of Or. 22 R. 6 is applicable to proceedings under the Administration of Evacuee Property Act and thus an order written and signed but not pronounced can be pronounced even after the death of the party affected. (MAHAJAN J.)

Ebrahim Aboobaker v. *Custodian General of Evacuee Property, Delhi*, 1952 SC 319 : 1952 SCR 696 : 1952 SCJ 483 : 90 CLJ 133 : 1952 MWN 502 : BLR 1952 SC 353 : 7 DLR SC 393 : 1952 SCA 501.

Or. XXX—Suit in the name of firm by partners doing business outside India.

Order XXX permits two or more persons carrying on business as partners to sue or be sued in the name of the firm, but the firm must be carrying on business in India. This enabling provision accords no such facility or privilege to partners constituting a firm doing business outside India.

1928 Bom 191 Overruled ; 1960 Cal 15 Affirmed. (IMAM J.)

Purushottam Umedbhai v. *Manilal & Sons*, 1961 SC 325.

O. XXXII R. 7—Certificate—form.

There is no set form in which the certificate which the Court is required to record need be made. Where the order shows that the Court was satisfied about the minor's benefit and gave permission, there is not only a technical but also a clear compliance with the law. (BOSE J.)

Bishundeo v. *Seogeni Rai*, 1951 SC 280 : 1951 SCR 548 : 1951 SCJ 413 : BLR 1951 SC 257 : 6 DLR (SC) 255 : 1952 SCA 388 : 1951 ALJ 127 : 89 CLJ 73 : 64 LW 971 : 30 Pat 947.

Negotiations for compromise—whether sanction necessary.

Reading the two sub-rules together Order 32 R. 7 means merely this. No next friend or guardian-ad-litem can enter into an agreement or compromise which will bind the minor unless the Court sanctions it. It is not necessary that before the guardian even begins negotiations for compromise with the other side, he must obtain sanction of the Court.

1940 Patna 663 Overruled. (BOSE J.)

Bishundeo v. *Seogeni Rai*, (*ibid*).

R. 7—Effect of non-compliance.

The non-obedience of the condition laid down in R. 7(1) does not make the agreement or decree void for it does not affect the jurisdiction of the Court at all It makes it only voidable at the instance of the minor in appropriate proceedings. (GAJENDRAGADKAR J.)

Kaushalya Devi v. *Baijnath*, 1961 SC 790.

R. 7(2)—Voidable.

What the rule means is that the impugned agreement can be avoided by the minor against the parties who are major and that it cannot be avoided by the parties who are major against the minor. It is incorrect to read the provision as meaning that the agreement is voidable against the parties to it who are major and is void in respect of the minor. (GAJENDRAGADKAR J.)

(*ibid.*)

Or. XXXIV R. 1. [.....all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

.....]

Whether mandatory.

There is ample authority for the view that this is merely a directory provision and non-joinder of any party is not a fatal defect and a decree can be passed so far as the parties actually on record are concerned unless the party omitted is a necessary party in the sense that in his absence no relief can be given at all even as regards parties actually on record. (MAHAJAN C. J.)

Jagan Nath v. *Jaswant Singh*, 1954 SC 210 : 1954 SCR 892 : 1954 SCJ 257 : 1954 SCA 1111 : 9 DLR SC 239 : 1954 (1) MLJ 480.

Effect of non-joinder of parties.

A sale in execution of a decree passed in a defectively constituted mortgage suit does not affect the rights of redemption of persons interested in the equity of redemption, who have not been impleaded as parties to the action, as they should have been under 0. 34 R. 1. But it is valid and effective as against the parties to the action. This rule has been affirmed even when the person in whom the equity of redemption had vested is the Official Receiver, and he had not been made a party to the proceedings resulting in sale.

(1854) 19 Beav. 551 Relied on. 1931 All 159 and (1954) Mad 80 (FB) Approved. (VENKATARAMA IYER J.)

Nagubai v. *Shama Rao*, 1956 SCR 451 : 1956 SC 593 : 1956 SCA 959 : 1956 SCJ 955 : 1956 SCC 321 : (1956) Mys. 152 : 1956 An LT 1029.

"All persons having".

In a suit for redemption the original defendant died and seven persons were substituted on the record as his legal representatives. Only 3 of them were served and the remaining four had not been served. Out of the 3 who had been served one had filed a statement claiming to be in possession of the property. The other two did not appear and contest the claim of that defendant being in possession. It was contended that the suit was bad in the absence of all the necessary parties and had abated.

Held (negativing the contention) that there was no question of abatement of the suit. Though there was no room for the application of Or. XXII R. 4 to the circumstances, the requirements of Or. XXII had been fulfilled by the suostitution of all the persons said to be the legal representatives. As it did not appear that the above parties were really necessary parties in the sense that they were jointly interested with the others on record in the property, the suit could not be said to be bad for non-joinder of necessary parties.

The only question which may or may not ultimately be found to be material on a proper investigation may be whether the decree to be passed would be binding on those who had not been served. (IMAM J.)

Nani Bai v. *Gita Bai*, 1958 SC 706 : 1959 SCA 173 : 1958 SCJ 925 : 1959 SCR 479 : 61 Bom LR 523.

O. XXXVII R. 3(1) —Conditional leave to sue.

The test, in general, is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. Once the Court is satisfied that the defence does raise a triable issue leave cannot be withheld and no question about conditions can arise.

This is not to say that if the court is of opinion that the defence is not bonafide, the Court is tied down to refusing leave to defend. In such a case the Court may impose conditions. But it cannot reach the conclusion that the defence is not bonafide arbitrarily and is as much bound by judicial rules and judicial procedure in reaching a conclusion of this kind as in anv other matter.

Where the trial court was of opinion that the defence did raise a triable issue but came to the conclusion that the defence was not bonafide only on the ground that the defendant did not prove his case even at the stage of granting of leave and therefore granted conditional leave to defend.

Held, interference was called for, though ordinarily no appeal will be entertained against an exercise of discretion ; as the stage of proof can come only after the defendant is granted leave to defend the suit, leave ought to have been given unconditionally. (BOSE J.)

Santosh Kumar v. *Bhai Mool Singh*, 1958 SCR 1211 : 1958 SCJ 434 : 1958 SC 321 : 1959 SCA 32 : (1958) 1 MLJ 159 : (1958) 1 An WR 159 : (1958) Punj 1263.

Or. XXXIX R. 2(3)—Wilful disobedience—Nature of proceedings.

A party cannot be said to have wilfully disobeyed an order of injunction if two conditions are satisfied : (1) that the order was ambiguous and was reasonably capable of more than one interpretation, (2) that the party being proceeded against in fact did not intend to disobey the order, but conducted himself in accordance with his interpretation of the order.

The question whether a party has understood an order in a particular manner and has conducted himself in accordance with such a construction is primarily one of fact.

Though the proceedings under 0. 39 R. 2(3) have a punitive aspect, they are in substance designed to effect the enforcement of or to execute the order. 0. 39 R. 2(3) is in essence only the mode for enforcement or effectuation of an order of injunction.

1954 Pat 513 Affirmed. (AYYANGAR J.)

State of Bihar v. *Rani Sonabati Kumari*, 1961 SC 221.

R. 2(3)—Disobedience by State.

No doubt the State Government not being a natural person cannot be ordered to be detained in civil prison, but beyond that, both when a decree for permanent injunction is executed and when an order of temporary injunction is enforced the liability of the State Government to be proceeded against appears to be clear.

The State is bound by the Code of Civil Procedure, the scheme of the Code being that subject to any special provision made in that regard, as respects Governments, it occupies the same position as any other party to a proceeding before the Court. The State as a party defendant is plainly within the terms of 0. 39 R. 2(3) of the Code.

1954 Pat 513 Affirmed. (AYYANGAR J.)

(*ibid.*)

Or. XLI R. 1—Non-compliance with provisions—Considerations.

No hard and fast rule of general applicability can be laid down for dealing with appeals defectively filed under this rule. Appropriate orders will have to be passed having regard to the circumstances of each case but the most important step to take in such cases is that they should be carefully scrutinised at the initial stage soon after they are filed and the appellant required to remedy the defects.

If at the time when the appeal is preferred a decree has already been drawn up by the trial Court and the appellant has not applied for it in time it would be a clear case where the appeal would be incompetent and a penalty of dismissal would be justified. The position would however be substantially different if at the time when the appeal is presented before the appellate Court a decree in fact had not been drawn up by the trial Court. (GAJENDRAGADKAR J.)

Jagat Dhish Bhargava v. *Jawahar Lal Bhargava*, 1961 SC 832.

Non-filing of copy of decree.

The requirement that a copy of the decree should be filed along with the memorandum of appeal is mandatory and in the absence of the decree the filing of the appeal would be incomplete, defective and incompetent.

(GAJENDRAGADKAR J.)

(*ibid.*)

R. 27—Subsequent change in the law.

It is well settled that an appellate court is entitled to take into consideration any change in the law. (IMAM J.)

Kotturuswami v. *Veerayya*, 1959 SC 577 : 1959 Sup 1 SCR 968 : 1959 SCJ 437 : 1959 (1) MLJ 158 : 1959 Nag LJ 299 : 1959 Pat LR 31 : 1959 MPLJ 662.

Additional evidence—when to be allowed.

It is well settled that additional evidence should not be permitted at the appellate stage in order to enable one of the parties to remove certain lacunae in presenting its case at the proper stage and to fill in gaps. Of course, the position is different when the appellate court itself requires certain evidence to be produced in order to enable it to do justice between the parties. (SINHA J.)

State of Uttar Pradesh v. *Manbodhan Lal*, 1958 SCJ 150 : 1957 SC 912 : 1957 SCA 1022 : 1957 All WR 710 : 1957 ALJ 921 : 1958 MLJ Cri 85.

Exercise of discretion—interference.

Where the appellate Court requires additional evidence to clear up the matter for the purpose of enabling it to come to a proper decision and allows it to be adduced, the exercise of such discretion will not be interefered with in second appeal. (S. R. DAS J.)

Kamalaranjan v. *Baijnath*, 1950 SCR 840 : 1951 SC 1 : 1951 SCJ 13 : 6 DLR (SC) 68 : 1951 MWN 361 : 64 LW 341 : BLR 1951 SC 6.

Discretion—when can be exercised.

The discretion to admit additional evidence in appeal is not an arbitrary one but a judicial one circumscribed by the limitations specified in Or. 41 R. 27. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it would be an improper exercise of discretion and such additional evidence will have to be ignored and the case decided as if it was non-existent.

The true test is whether the appellate court is able to pronounce judgment on the materials before it without considering the additional evidence sought to be adduced. Where there is no examination of the evidence on record and a decision reached that the evidence as it stood disclosed a lacuna which the appellate Court required to be filled up, *held*, the appellate Court was not justified in admitting the additional evidence even before hearing the appeal. (CHANDRASEKHARA IYER J.)

Arjan Singh v. *Kartar Singh*, 1951 SC 193 : 64 LW 537 : 1951 SCJ 274 : 6 DLR (SC) 465 : 1951 (1) MLJ 556 : 1951 MWN 340 : 1951 SCR 258 : 1951 AWR 437 : 1951 ALJ 78 : BLR 1951 SC 164 : 1951 CWN 194 : 87 CLJ 243.

R. 27 and R. 33—Subsequent events.

Even though an appeal is in the nature of a rehearing and the courts in this country can take into account the facts and events which have come into existence after the decree appealed against, it could only be for moulding the relief to be granted in the appeal.

1941 FC 5 Relied on. (BHAGWATI J.)

Chunilal K. Patel v. *H. K. Adhyaru*, 1956 SC 655 : 1956 SCA 685 : (1956) 26 Comp. Cas. 168.

Or. XLV R. 7 (as amended in 1920)—Jurisdiction to extend time.

The High Court has jurisdiction to extend time for furnishing security for costs of the respondents under this rule. The High Court had such jurisdiction prior to the amendment of 1920 and that amendment has made no difference in that behalf. Or. XII R. 3 of the Supreme Court Rules leads to the same conclusion.

('35) 39 Cal. WN 651 holding that the High Court has no jurisdiction to extend time and the practice in the Calcutta High Court since that decision—Not Approved. (GAJENDRAGADKAR J.)

Shew Bux Mohata v. *Sm. Tulsimanjari Dasi*, 1961 SC 1453.

R. 8.

When a High Court grants a certificate giving leave to a party to appeal to the Supreme Court, it is that court which retains full control and jurisdiction of

the appeal till the appeal is finally admitted. The jurisdiction of the Supreme Court begins after the appeal is finally admitted. (MUKHERJEA C. J.)

Shiva Jute Baling Ltd. v. *Hindley & Co.*, 1955 (2) SCR 243 : 1955 SC 464 : 1955 SCA 617 : 1955 SCJ 461 : 1955 (2) MLJ 36 : 1955 MWN 941.

O. XLVII R. 1—Error apparent on the face of the record—Omission to decide important issue.

Where a judgment does not effectively deal with and determine an important issue in the case on which depends the title of the plaintiff and the maintainability of the suit, that is certainly an error apparent on the face of the record. (JAGANNADHA DAS J.)

M. M. B. Catholicos v. *M. P. Athanasius*, 1954 SC 526 : 1955 (1) SCR 520 : 1954 SCJ 736 : 1955 SCA 1354 : 9 DLR SC 337.

Decision on matters not in issue.

To decide against a party on matters which do not come within the issues on which the parties went to trial clearly amounts to an error apparent on the face of the record. (JAGANNADHA DAS J.)

M. M. B. Catholicos v. *M. P. Athanasius*, (*ibid*).

Misconception as to concession.

Where the error complained of is that the court assumed that a concession had been made when none had in fact been made or misconceived the terms of the concession or the scope and extent of it, it will not generally appear on the record but will have to be brought before the Court only by way of review. (JAGANNADHA DAS J.)

M. M. B. Catholicos v. *M. P. Athanasius*, (*ibid*).

"Any other sufficient reason".

The words "any other sufficient reason" must mean a reason sufficient on grounds, at least analogous to those specified in the rule.

49 Ind. App. 144, 61 Ind. App. 378 and 1949 FCR 36 Relied on. (JAGANNADHA DAS J.)

M. M. B. Catholicos v. *M. P. Athanasius*, (*ibid*).

CODE OF CRIMINAL PROCEDURE, 1898.

S. 5—applicability to proceedings for contempt of High Court.

The Code of Criminal Procedure does not apply in matters of contempt triable by the High Court.

1945 All 1 Overruled. (BOSE J.)

Sukhdev Singh v. *Teja Singh, Hon'ble Chief Justice of the Pepsu High Court*, 1954 SC 186 : 1954 SCR 454 : 1954 SCJ 67 : 1954 SCA 363 : 9 DLR SC 120 : 1954 AWR 186 : 1954 (1) MLJ 137 : 1954 MWN 131.

S. 145 (6)—nature of order.

The order of the Criminal Court decides no question of title and is co-terminous with the passing of a decree by a civil court. It cannot enable a person to resist a suit in ejectment on the basis of title. (SUBBA RAO J.)

Bhinka v. *Charan Singh*, 1959 SC 960 : 1959 Sup 2 SCR 798 : 1960 SCJ 892.

S. 195(1)(b)—"Court"—What constitutes.

It may be stated broadly that what distinguishes a court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definite judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it.

It imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law.

A returning officer deciding on the validity of a nomination paper under section 36 of the Representation of the People Act, is not a court within the meaning of section 195. (VENKATARAMA IYER J.)

Virindra Kumar Satyawadi v. *State of Punjab*, 1955(2) SCR 1013 : 1956 SC 153 : 1956 SCJ 138 : 1956 SCA 410 : (1956) Punj. 163 : 1956 Cri LJ 326 : 58 Pun LR 583.

S. 195 (3) and S. 476 A—Punjab Courts Act—Courts to which appeals ordinarily lie.

In Punjab there are three forums of appeal from the Court of the Subordinate Judge depending on the nature of the suit and its value.

It cannot be said that appeals from the Courts of the various Subordinate Judges 'ordinarily' lie to the Senior Subordinate Judge. But appeals do 'ordinarily' lie either to the District Court or the High Court. As the District Court is the lower of these two tribunals that must be regarded as the appellate authority contemplated by S. 195 (3) and its proviso. (BOSE J.)

Kuldip Singh v. *State of Punjab*, 1956 SCR 125 : 1956 SC 391 : 1956 SCA 809 : 1956 SCJ 87 : (1956) Punj. 1075 : 1956 Cri LJ 781 : 1956 SCC 455 : 58 Pun LR 595.

COMMERCIAL DOCUMENTS EVIDENCE ACT, 1939

S. 3(b)—Presumption—scope of.

A certified copy of the Balance Sheet of a company issued by the Registrar of Companies was produced in evidence and it was contended that the copy proved itself. It was rejected by the lower Court as not admissible on a consideration of sections 65 and 74 (2) of the Evidence Act.

Held, the copy is admissible in evidence under section 3 (b) (without further proof). However the presumption under the section as to the accuracy of the statements contained therein, is not compulsory as in the case of section 3 (a). The Court may, in the peculiar circumstances of a case, be justified in not raising the presumption. (BHAGWATI J.)

Kashinath S. Wani v. *New Akot Cotton Ginning and Pressing Co. Ltd.*, 1958 SCR 1331 : 1958 SC 437 : 1958 SCJ 748 : 1958 SCA 211 : 1958 Lab LJ 362 : (1958) 2 MLJ 125 : 1958 (2) An WR 125.

CO-MORTGAGORS

Right of subrogation—Principles of equity—extent of right in Punjab.

As the Transfer of Property Act has not been extended to the State of East Punjab the question of a co-mortgagor's right of subrogation has to be decided on principles of justice, equity and good conscience. While it can be readily conceded that the joint debtor who pays up and discharges the mortgage stands in the shoes of the mortgagee and secures to himself the benefit of such security by such payment, the extent to which he can enforce his right as against the other joint debtors is a different matter altogether. The redeeming co-mortgagor being only a surety for the other co-mortgagors, his right is, strictly speaking, a right of reimbursement or contribution and in law, having regard to the principles of equity and justice, there should be no difference between a case where he discharges an unsecured debt and a case where he discharges a secured debt. To compel the co-debtors or co-mortgagors to pay more than their share of what was paid to the creditor or the mortgagee would be to perpetrate an iniquity or injustice and to violate the rule "He who seeks equity must do equity".

Held, that the co-mortgagor who on redeeming the mortgage claims subrogation from the other co-mortgagors can recover only their shares in the amount he has paid for redemption and not their shares in the full amount due under the mortgage.

1949 EP 254 Affirmed ; 25 MLJ 16 and 14 CWN 617 Approved.

(CHANDRASEKHARA IYER J.)

Ganeshilal v. *Jyoti Pershad*, 1953 SCR 243 : 1953 SC 1 : 1953 SCJ 649 : 1953 SCA 339 : 8 DLR SC 67 : 94 CLJ 137 : 66 LW 183.

COMPANIES ACT, 1913.

Ss. 32(3) and 76—Where no general meeting was held.

The fact that no general meeting was held is no defence to a charge of not complying with the requirements of S. 32. S. 76 does not interfere with the operation of S. 32. (SARKAR J.)

State of Bombay v. *Bandhan*, 1961 SC 186.

S. 87B(f)—Termination—when takes effect.

When a company at a general meeting approves of an appointment or of a removal of a managing agent, the approval takes effect from the date of the appointment or removal by the Board of Directors of the company.

(WANCHOO J.)

Karumuthu Thiagarajan v. *Muthappa Chettiar*, 1961 SC 125.

S. 89—Scope of the section.

There is no doubt that before a company can be bound by a negotiable instrument one of the essential conditions is that the instrument must on its face show that it has been drawn, made, accepted or endorsed by the company. This may be done either by showing the name of the company itself on the instrument or by the statement of the person making the instrument that he is doing so on behalf of the company. In other words unless the plain tenor of the instrument on its face satisfies the relevant requirement the instrument cannot be validly treated as an instrument drawn by the company.

4 Bom 275 Approved ; 46 Cal. 663 (PC) Ref. to.

But this principle in terms is applicable only when a claim is made against a company to enforce a negotiable instrument defectively drawn and cannot be extended to a claim made by a company against its Bank on the ground that a cheque, which had been accepted and honoured, in good faith, by the Bank, was defectively drawn in that it did not comply with the requirements of S. 89.

(1875) 7 HL 869 Relied on ; Chalmers on Bills of Exchange, p. 63 and Halsbury's III Edn., Vol. 6, p. 429 para 830 Ref. to ; 1956 Bom. 57 Affirmed.
(GAJENDRAGADKAR J.)

Oriol Industries Ltd. v. *Bombay Mercantile Bank Ltd.*, 1961 SC 993.

S. 105-C—applicability.

The section becomes applicable only when the Directors decide to increase the capital within the authorised limit by the issue of further shares.
(Per DAS and MUKHERJEA JJ.)

(NOTE.—While KANIA C. J. expressed no opinion on the point, MAHAJAN J. was inclined to hold that this interpretation of the section seemed more plausible but did not finally express an opinion).

Nanalal v. *Bombay Life Assurance Co.*, 1950 SCR 391 : 1950 SC 172 : 1950 SCJ 357 : 52 Bom. LR 745 : 5 DLR SC 139 : 1950 MWN 745 : 1950 Comp. Cas 179.

Issue of further shares—discretion of Directors.

The object of the section is to prevent discrimination amongst shareholders and to prevent the Directors from offering shares to outsiders before they are offered to the shareholders. So long as the these two requirements are complied with, the selecting of the time when these shares will be issued and also the proportion in which they are to be issued are matters left to the discretion of the Directors and it is not the province of the Court to interfere in the exercise of such discretion. (KANIA C. J.)

It is within their discretion to say to what extent they will increase the capital and to decide how many shares and of what value they will issue. Once they have taken the decision, it is then and then only that S. 105C comes into operation.
(MAHAJAN J.)

(*ibid.*)

Bonafides.

The Directors of a company are in a fiduciary position *vis-a-vis* the company and must exercise their power for the benefit of the company. If the power to issue further shares is exercised by the Directors not for the benefit of the company but simply and solely for their personal aggrandisement and to the detriment of the company, the Court will interfere and prevent them from doing so. The very basis of the Court's interference in such a case is the existence of the relationship of a trustee and *cestui que trust* as between the Directors and the company.

Where the company is in need of funds and the issue of further shares is clearly necessary and is referable to such need, a further motive on the part of the Directors of keeping out a stranger who is not yet a shareholder, and who is trying to acquire control of the management of the Company will not prejudicially affect the Company or the existing shareholders and the presence of such further motive cannot vitiate the good motive of finding funds for the Company.
(S. R. DAS J.)

(*ibid.*)

Substantial Compliance.

Out of the authorised capital of a Company, 4956 shares which remained unissued, were by a resolution of the Board of Directors decided to be newly issued and the existing shareholders were offered these shares in the proportion of 4 new shares to every 5 shares held by them in the capital of the Company on that date. It was contended that this left 272 4/5 shares with the Directors to be allotted to any one in their discretion (but in point of fact the Directors had not allotted any of these shares) and that therefore the issue was in contravention of S. 105-C.

Held, (negativing the contention)

The requirements of the section were substantially complied with and the issue of further shares in such manner could not be called in question, for in whatever proportion the new shares were allotted there was bound to be a balance left and so long as the unoffered balance was not disposed of contrary to the provisions of the section, the charge of contravention of it could not be levelled against the Directors.

(*ibid.*)

Rights of transferee whose name is not entered in Company's register.

Where a member of a Company transfers his holding to a third person and, before the transfer is recognised by the Company and the transferee's name entered in the Company's registers, the Company decides to increase the capital by the issue of further shares, the transferor cannot, as a constructive trustee retain any benefit himself of the new issue annexed to the shares sold by him and the benefit of the offer made under S. 105-C must go to the transferee.

But all that the transferee can call upon the transferor to do in such a case, is to sign the renunciation form in his favour for him to apply in his own name for the purchase of the new shares. More than that he is not entitled to call upon the transferor to do. The contention that the transferor is bound to buy the new shares in his own name for the benefit of the transferee is not well founded, for a trustee cannot be asked to invest his own money for the benefit of the *cestui que trust*.

1950 Bom. 76 Reversed. (MAHAJAN J.)

Mathalone R. v. *Bombay Life Assurance Company*, 1953 SC 385.

Receiver—whether entitled to apply.

Before the name of a transferee of certain shares of a Company was registered in the Company's books, the Company issued further shares under S. 105-C. The transferee filed a suit against the transferor for delivery of the renunciation forms duly signed by the defendant. A receiver was appointed in the suit and he applied to the Company for allotment of the new shares in his name.

Held, the privilege was conferred by S. 105-C only on a person whose name was on the register of members and as the name of the Receiver was not there, the company was not bound to entertain that application. The Company not being a party to the suit cannot be compelled to recognise the Receiver as a shareholder in the place of the defendant.

1950 Bom 76 Approved. (MAHAJAN J.)

Mathalone R. v. *Bombay Life Assurance Company*, 1953 SC 385.

S. 131—Where no general meeting was held.

The fact that no general meeting was held is no defence to a charge of not complying with the requirements of S. 131. (SARKAR J.)

State of Bombay v. *Bandhan*, 1961 SC 186.

S. 153—Inchoate Scheme.

Till a proposed scheme is formally approved by the shareholders and creditors and is sanctioned by the Court and the share capital thus reduced, the preference shareholders cannot acquire any rights under the proposed scheme or become beneficiaries regarding the amount realised by sale of certain assets of the company under the proposed scheme. Till that event happens, it is obvious that the amount realised remains the property of the Company. (MAHAJAN C. J.)

Gaya Sugar Mills Ltd. v. *Nand Kishore*, 1955 (25) Com. Cas. 24 : 1955 SC 441.

S. 153 C—Appointment of administrators—whether an interference with the internal management of the Company.

The rule that courts will not, in general, intervene at the instance of shareholders in matters of internal administration, and will not interfere with the management of a Company by its directors, so long as they are acting within the power conferred on them under the Articles of Association, can apply only when the Company is a running concern, and it is sought to interfere with its affairs as such. But when an application is presented to wind up a company, there is no scope for this rule. Accordingly, where a case had been made out for an order for winding up under S. 162, the appointment of administrators under S. 153C cannot be attacked as an interference with the internal management of the company. (VENKATARAMA IYER J.)

Rajahmundry Electric Supply Corporation Ltd. v. *Nageshwara Rao*, 1955 (2) SCR 1066 : 1956 SC 213 : 1956 SCJ 218 : 1956 SCA 300 : (1956) 26 Com Cas. 91 : 1956 (1) MLJ 95 : 69 LW 918.

S. 153C, Sub-clause (3) (a) (i)—withdrawal of consent by some members—effect.

The validity of a petition must be a judged on the facts as they were at the time of its presentation, and a petition which was valid when presented cannot, in the absence of a provision to that effect in the statute cease to be maintainable by reason of events subsequent to its presentation. The withdrawal of consent by some cannot affect either the right of the applicant under S. 153-C to proceed with the application or the jurisdiction of the Court to dispose of it on its own merits. (VENKATARAMA IYER J.)

Rajahmundry Electric Supply Corporation v. *Nageshwara Rao*, (*ibid*).

S. 162 (vi)—'Just and equitable'.

The words 'just and equitable' in cl. (vi) must not be construed *ejusdem generis* with the matters mentioned in cls. (i) to (v) of S. 162.

1924 A. C. 783 Relied on. (VENKATARAMA IYER J.)

(*ibid*).

Whether mismanagement by directors is a ground.

Whether a mismanagement of directors is a ground, for a winding up order under S. 162 (vi) is a question of fact in each case. Where nothing more is established than that the directors have misappropriated the funds of the company, an order for winding up would not be just or equitable, because if it is a sound concern, such an order must operate harshly on the rights of the shareholders. If in addition to such misconduct, circumstances exist which render it desirable in the interests of the shareholders that the Company should be wound

up, there is nothing in S. 162 (vi) which bars the jurisdiction of the Court to make such an order.

1924 A. C. 783 Relied on. (VENKATARAMA IYER J.)

(*ibid*).

Ss. 171 and 232—winding up proceedings in respect of a Bank.

Sections 171 and 232 are applicable to winding up proceedings in respect of a Bank, even after the Banking Companies Act was amended in 1953. (JAGANNADHA DAS J.)

Ram Narain v. *Simla Banking and Industrial Co. Ltd.*, 1956 SCR 603 : 1956 SC 614 : 1956 SCJ 579 : 1956 SCA 893 : 26 Comp. Cas 280 : (1956) Punj 1321 : 59 Pun LR 1.

S. 179—Scope and powers of the liquidator.

The section does not purport to impose any limitations on the powers of a criminal court to entertain a criminal prosecution launched in the ordinary course under the provisions of the Cr. P. C. It is an enabling provision to enable the liquidator to do certain things with the sanction of the court. It does not control the general law of the land. (SINHA J.)

Jaswantrai Manilal Akhaney v. *State of Bombay*, 1956 SC 575 : 1956 SCR 483 : 1956 SCJ 613 : 1956 SCA 941 : 1956 (2) MLJ 49 : 26 Comp. Cas. 340 : 58 Bom LR 1026 : 1956 All WR 126.

S. 185—Agent.

Under a proposed scheme to redeem the preference shareholders and reduce the share capital of a Company, two persons N. & M. were authorised to sell some of the company's assets for the purpose. But neither a meeting of the creditors was held to approve the scheme formally nor the sanction of the Court obtained for reduction of the capital. *Held*, N. & M. remained agents of the Company in custody of the sale proceeds, for the relationship of principal and agent need not be expressly constituted and can be brought about by implication of law on a particular situation arising or from the necessity of a case and that therefore, on winding up, the official liquidator was entitled to return of the monies under Section 185. (MAHAJAN C. J.)

Gaya Sugar Mills Ltd. v. *Nand Kishore*, 1955 SC 411 : (1955) 25 Com. Cas. 24.

Ss. 230(3) and 193.

Where a (Banking) Company has closed its business and the liquidators are not carrying on any business after the winding up and the premises in which the business of the Company was previously being carried on are not used by the liquidators for the purpose of liquidation, unless the Court passed an order holding that the debt incurred is part of the costs and expenses of liquidation, the rent accruing due since the date of the winding up cannot be claimed in priority over other ordinary debts. In cannot be held that by virtue of R. 97 of the Company Rules framed by the High Court of Allahabad that the landlord is entitled to priority in respect of payment of rent.

1956 A11 586 Reversed. (SHAH J.)

Official Liquidators, U. P. Union Bank Ltd. v. *Rameshwar Nath Agarwal*, 1960 SC 332 : 1960 (2) SCR 189 : 1960 SCJ 334 : 30 Comp. Cas. 114 : 1960 (1) MLJ 93.

S. 232 (1)—Right of secured creditor.

Prior to the amendment of the section in 1936, the law was well settled that the secured creditor was outside the winding up and he could realise his security without the intervention of the Court by effecting a sale of the mortgaged premises by private treaty or by public auction.

The sale of the mortgaged premises was also brought by the amendment (by Act 22 of 1936) on a par with the attachment, distress or execution put in force at the instance of the secured creditor and having regard to the context such sale could only be construed to be a sale held through the intervention of the Court and not one effected by the secured creditor outside the winding up and without the intervention of the Court.

The amendment in 1936 was not intended to effect a fundamental alteration in law with irresistible clearness. (BHAGWATI J.)

M. K. Ranganthan v. *Govt. of Madras*, 1955 SC 604 : 1955 SCJ 515 : 1955 SCA 841 : (1955) 25 Comp. Cas. 344 : 1955 MWN 805 : 1955 (2) MLJ 68.

S. 237 (1)—absence of sanction.

The section contains no words which indicate that a prosecution cannot be instituted against a past director by a liquidator without the sanction of the Judge or that the Court cannot take cognizance of a complaint without such sanction or direction. (KAPUR J.)

Dr. Sailendranath Jha v. *Jasoda Dulal*, 1959 SC 51 : 1959 SCR 1263 : 1959 SCJ 205 : 1959 (1) MLJ 127 : 28 Com. Cas. 609 : 1959 All WR 147.

COMPANIES ACT, 1956.

S. 11(2)—effect of non-registration.

A claim for rendition of accounts in enforcement of a contract of partnership which, not being registered under the Companies Act, is an illegal partnership is clearly untenable, for the relief necessarily implies a recognition by the Court of that illegal partnership. The only course for the Courts to pursue is to say that the plaintiff is not entitled to any relief on the allegations which on the face of them show that the contract of partnership on which he sues is illegal. In such a case the argument by analogy of S. 69 (3) (a) of the Partnership Act, 1932 will not be of any help to the plaintiff, for under that Act an unregistered firm is not illegal. (S. K. DAS J.)

Badri Prasad v. *Nagarmal*, 1959 SC 559 : 1959 SCJ 394 : 1959 SCA 483 : 29 Comp. Cas. 229.

S. 111—Scope of the Jurisdiction.

The Central Government may order the transfer to be registered, which the Directors, in their discretion, have refused, if it is satisfied that the exercise of the discretion was *malafide*, arbitrary or capricious and that it is in the interest of the company that the transfer should be registered. (SHAH J.)

Harinagar Sugar Mills Ltd. v. *Shyam Sunder Jhunjhunwala*, 1961 SC 1669.

Ss. 239 and 240—validity.

Sections 239 and 240 do not violate Art. 14 of the Constitution on the ground that the protection afforded to the witnesses under S. 132 of the Evidence Act

and to the accused under S. 161 (1) and (2) Cr. P. C. have been denied to the persons in charge of the management of the companies.

1959 SC 538 Relied on ; 1959 Bom 320 Affirmed. (GAJENDRAGADKAR J.)

Narayanlal v. *M. P. Mistry*, 1961 SC 29.

S. 240—Constitutional validity.

When a person is called upon under S. 240 to give evidence and to produce documents, he cannot be said to be a person who is accused of any offence as required by Art. 20(3) of the Constitution and therefore the provisions of S. 240 do not offend against the fundamental rights guaranteed by Art. 20(3).

A general enquiry and investigation into the affairs of the company cannot be regarded as an investigation which starts with an accusation contemplated in Art. 20(3) of the Constitution.

1959 Bom 320 Affirmed. (GAJENDRAGADKAR J.)

(ibid.)

Ss. 312 and 255—"assignment"—appointment by will.

The word "assignment" in S. 312 does not include "appointment". The Act contemplates an appointment by a Director of another person as Director to take his office, when made vacant by his resignation on the expiry of the term of his office. There will be nothing illegal if the power is exercised in the case of the death of the Director by an appointment made by his will. Such power is clearly recognised and legal under S. 255.

1960 Bom 167 Reversed. (SARKAR J.)

Oriental Metal Pressing Works Private Ltd. v. *Bhaskar Kashinath Thakoor*, 1961 SC 573.

S. 235 and Ss. 645 to 648—Inspector appointed under the old Act—Effect of the repeal of the old Act.

Sections 645 to 648 are the saving sections, and ordinarily and in the absence of any indication to the contrary these saving clauses should be read as independent of, and in addition to, and not as providing exceptions to, one another. S. 646 should not be construed as a proviso to S. 645 but as an additional saving provision.

The Inspector appointed under S. 138(4) of the old Act must, by legal fiction, which is authorised by S. 645, be deemed to have been appointed under S. 235 of the new Act.

1959 Bom 320 Affirmed. (GAJENDRAGADKAR J.)

Narayanlal v. *M. P. Mistry*, 1961 SC 29.

S. 658—pending applications under S. 153-C of the Companies Act, 1913.

By virtue of S. 6 of the General Clauses Act, 1897, which is expressly made applicable by S. 658 to pending proceedings, a proceeding in respect of an application under S. 153-C of the Companies Act, 1913 commenced before the commencement of the Act of 1956 may be continued after the repeal of the 1913 Act by the Act of 1956 and a District Judge before whom the proceeding was pending will continue to have jurisdiction to entertain it, even though the application also

asks for winding up of the Company whose paid-up share capital exceeds Rs. 1,00,000/- and power to deal with such an application cannot be given to a District Court under S. 10 of the Act of 1956. (SARKAR J.)

Brihan Maharashtra Sugar Syndicate Ltd. v. *Janardan Ramachandra*, 1960 SC 794 : 1960 (3) SCR 85 : 1960 SCJ 760 : 30 Com. Cas. 468 : 62 Bom LR 515 : 1960 Andh LT 393.

Company and shareholder—distinction.

A company is a juristic person and is distinct from its shareholders. It is the company which owns the property and not the shareholders. A shareholder gets no interest in the property of the company though undoubtedly he has a right to participate in the profits if and when the company chooses to divide them. From the use of the word "assets" in (1924) 8 Tax. Cas. 704 at p. 710, the inference cannot be drawn that a shareholder, on investing money in purchasing the share becomes entitled to the assets of the company and has any share in the property of the Company. (GHULAM HASAN J.)

(*Mrs.*) *Bacha F. Guzdar* v. *Commissioner of I. T. Bombay*, 1955 SCR 876 : 1955 SC 74 : 1955 SCA 675 : 1955 SCJ 68 : 1955 (27) ITR 1 : 1955 (25) Com. Cas 1 : 1955 Andh WR 27 : 57 Bom LR 617 : 1955 (1) MLJ 27 : 1955 Andh LT (civil) 54.

Company—termination of the managing agency—legality.

There were serious and long standing disputes between the two partners of the managing agency firm of a company which were such as to impair their capacity to discharge their duty to the company as managing agents and to affect the interests of the company prejudicially. By resolutions of the Board of Directors and the general meeting of the shareholders of the company the managing agency was terminated and the question was whether such termination was legal. The High Court held that one of the partners who had acquired a controlling interest in the company had fraudulently and collusively with the company got the managing agency terminated and that therefore it was illegal.

On appeal to the Supreme Court, *held*, (disagreeing with the view of the High Court) the fact that the partner had a controlling interest in the company would not necessarily make his conduct fraudulent, for, as a major shareholder, he could legitimately act to protect the company and the termination was therefore not illegal. (WANCHOO J.)

Karumuthu Thiagarajan v. *Muthappa Chettiar*, 1961 SC 1225.

Company—Transfer of shares after declaration of dividend.

A transfer of shares, after dividend declared, does not, as against the company, carry the dividend, even where the transferee has expressly bought *cum* dividend but, as between the buyer and seller of shares, the buyer is entitled to all dividends declared after the date of the contract for sale, unless otherwise arranged.

Palmer's Company Law 19th edn. page 205 Referred to. (BHAGWATI J.)

Chunilal Patel v. *H. K. Adhyaru*, 1956 SC 655.

Rights of blank transferee.

The Company recognizes no person except one whose name is on the register of members, upon whom alone calls for unpaid capital can be made and to whom only the dividend declared by it is legally payable. Of course as between the

transferor and the transferee certain equities arise even on the execution and handing over of what is known as a "blank transfer" and among these equities is the right of the transferee to claim the dividend declared and paid to the transferor who is treated as a trustee on behalf of the transferee. These equities, however, do not touch the company and no claim by the transferee whose name is not on the register of members can be made against the company, if the transferor retains the money and fails to pay it to him. (HIDAYATULLAH J.)

Howrah Trading Co. Ltd. v. *Commr. of Income-tax, (Central) Calcutta*, 1959 SC 775.

CONSTITUTION OF INDIA (1950)

INTERPRETATION

Analogy of Constitutions of other countries.

A provision in the Indian Constitution cannot be interpreted in accordance with the interpretation put upon a somewhat analogous provision in the Constitution of another country when not only the language (of the provision) is different but the entire political conditions and constitutional set-up are dissimilar.
(MUKHERJEA J.)

A. K. Gopalan v. *State of Madras*, 1950 SCR 88 : 1950 SCJ 174 : 1950 SC 27 : 1950 MWN 495 : 1950 (2) MLJ 42 : 63 LW 638 : 51 Cr. LJ 1383.

Hardship.

The Articles of the Constitution have to be construed according to their plain natural meaning and cases of hardship should not be brought to bear on the natural construction. Hard cases should not be permitted to make bad law.
(KANIA C. J.)

Janardhan Reddy v. *State*, 1951 SC 124 : 1951 SCJ 98 : 6 DLR (SC) 110 : 1951 MWN 709 : 64 LW 110.

Inconvenience.

If the language of an Article is clear and unambiguous and admits of only one meaning, then the duty of the Court is to adopt that meaning irrespective of the inconvenience that such a construction may produce. If, however, two constructions are possible, then the Court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory. (S. R. DAS J.)

State of Punjab v. *Ajaib Singh*, 1953 SC 10 : 1953 SCR 254 : 1952 SCJ 664 : 1952 SCA 791 : 8 DLR SC 35 : 1953 MWN 355 : 54 Cr LJ 180.

Spirit of the Constitution.

There is considerable authority for the statement that Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. When the fundamental law has not limited, either in terms or by necessary implication the general powers conferred upon the Legislature, the Court cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. (KANIA C. J.)

A. K. Gopalan v. *State of Madras*, 1950 SCR 88 : 1950 SCJ 174 : 1950 SC 27 : 1950 MWN 495 : 1950 (2) MLJ 42 : 63 LW 638 : 51 Cr. LJ 1383.

It is well settled that recourse cannot be had to the spirit of the Constitution when its provisions are explicit in respect of a certain right or matter. This elusive spirit is no guide and cannot prevail as against the letter of the Constitution. (MAHAJAN J.)

State of Bihar v. *Sir Kameshwar Singh*, 1952 SC 252.

Entries in the Seventh Schedule.

It is well settled that the heads of legislation contained in the various entries in the lists of the Seventh Schedule should not be construed in a narrow and pedantic sense but should be given a large and a liberal interpretation. (BHAGWATI J.)

Sri Ram Narain v. *State of Bombay*, 1959 SC 459.

In the interpretation of the scope of the items in the various lists the widest possible amplitude must be given to the words used and each general word must be held to extend to ancillary or subsidiary matters which can fairly be said to be comprehended in it. (KAPUR J.)

Chaturbhai M. Patel v. *Union of India*, 1960 SC 424 : 1960 (2) SCR 362 : 1960 SCJ 224 : 1960 (1) SCA 425 : 1960 ALJ 262.

The entries in the lists are heads of legislation which are to be interpreted in a liberal manner comprising within their scope all matters incidental thereto. (BHAGWATI J.)

Commissioner of Income-tax, W. Bengal v. *Benod Kumar Saha Roy*, 1958 SCR 101 : 1957 SC 768 : 1957 SCJ 740 : (1957) 32 ITR 466 : (1957) 2 MLJ 145 : 1957 (2) An WR 145.

The power to legislate on a topic of legislation carries with it the power to legislate on an ancillary matter which can be said to be reasonably included in the power given. (HIDAYATULLAH J.)

State of Rajasthan v. *Chawla*, 1959 SC 544 : 1959 SCJ 585.

VALIDITY OF AN ACT

Tests for determination.

When the validity of an Act is questioned, the Court has to examine :—

(1) whether the Act is a law with respect to a topic assigned to the particular Legislature which enacted it ;

(2) whether, in the case of an Act passed by a State Legislature, its operation extends beyond the boundaries of the State ; and

(3) whether there is anything in any other part of the Constitution placing any fetter on the powers of such legislature.

The impugned law has to pass all these three tests. (S. R. DAS C. J.)

State of Bombay v. *R. M. D. Chamarbaugwalla*, 1957 SC 699 : 1957 SCJ 607 : 1957 SCA 867 : 1957 (2) MLJ 87 : 59 Bom LR 945.

Colourable legislation.

If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject matter of the statute or in the method of enacting it transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements.
(MUKHERJEA J.)

Gajapathy Narayan Deo v. *State of Orissa*, 1953 SC 375 : 1954 SCR 1 : 1954 SCA 1 : 1953 SCJ 592 : (1954) Orissa 351 : 20 CLT 1.

Doctrine of pith and substance

If an Act substantially falls within the powers expressly conferred upon the Legislature which enacted it, then it cannot be held to be invalid merely because it incidentally encroaches on matters which have been assigned to another legislature.
(FAZL ALI J.)

State of Bombay v. *F. N. Balsara*, 1951 SCR 682 : 1951 SC 318 : 1951 SCJ 478 : 7 DLR (SC) 24 : BLR 1951 SC 425 : 53 Bom LR 982 : 1951 (2) MLJ 141.

Enactment must be considered as a whole.

If a statute is found in substance to relate to a topic within the competence of a legislature, it should be held *intra vires* according to the doctrine of pith and substance even though it might incidentally trench upon topics not within its legislative competence. The extent of such encroachment may be an element in determining whether the legislation is colourable, that is whether in the guise of making a law on a matter within its competence, the legislature is in truth making a law on a subject beyond its competence. But where that is not the position then the fact of encroachment does not affect the *vires* of the law even as regards the area of encroachment.

Case Law Ref. to.

To determine whether a legislation is *ultra vires* the powers of the legislature which enacted it what has to be ascertained is the true character of the legislation, regard being had to the enactment as a whole, to its objects, and to the scope and effect of its provisions. It would be an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then distintegrate it into parts, examine under what heads of legislation those parts would severally fall and by that process determine what portions thereof are *intra vires* and what are not.
(VENKATARAMA IYER J.)

A. S. Krishna v. *State of Madras*, 1957 SCR 399 : 1957 SC 297 : 1957 SCA 480 : 1957 Cri LJ 409 : 1957 SCJ 216 : 1957 (1) MLJ 59 : 1957(1) Andh WR 59.

Delegated Legislation.

For a detailed discussion of the subject, *See*—

In re Art. 143, *Constitution of India*, 1951 SCR 747 : 1951 SC 332 : 1951 SCJ 527.

When permissible.

When a legislature is given plenary power to legislate on a particular subject there must also be an implied power to make laws incidental to the exercise of such power. It is a fundamental principle of constitutional law that everything necessary to the exercise of a power is included in the grant of the power. A legislature cannot strip itself of its essential functions and vest the same on an extraneous authority. The primary duty of law making has to be discharged by the legislature itself but delegation may be resorted to as a subsidiary or an ancillary measure. (MUKHERJEA J.)

Edward Mills Ltd. v. *State of Ajmer*, 1955 SCR 735 : 1955 SC 25 : 1955 SCA 24 : 1955 SCJ 42 : 1955 (1) MLJ 1.

Change of policy.

An executive authority can be authorised to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms ; but this much is clear that it cannot include a change of policy. Therefore, when a section of an Act is selected for application, whether it is modified or not, it must be done so as not to effect any change of policy or any essential change in the Act regarded as a whole. (BOSE J.)

[Section 3 (1) (f) of the Patna Administration Act, 1915 as amended in 1928 held *intra vires*, provided that the words "restriction" and "modification" are used in such restricted sense.]

Raj Narain Singh v. *Patna Administration Committee*, 1954 SC 569 : 1955 SCR 190 : 1954 SCJ 661 : 1954 SCA 774 : 1954 (2) MLJ 344.

Motives of Legislature irrelevant.

The Court will scrutinize the law to ascertion whether the Legislature by device purports to make a law which, though in form appears to be within its sphere, in effect and substance reaches beyond it. If, in fact, it has the power to make the law, its motives in making the law are irrelavant. (SUBBA RAO J.)

Gullapalli Nageswara Rao v. *Andhra Pradesh Road Transport Corporation*, 1959 SC 308 : 1959 SCJ 967 : 1959 (2) Andh WR 156.

Extra territoriality.

The question whether in a given case there is sufficient territorial nexus between the person sought to be charged with a tax and the State seeking to tax him to uphold the taxing statute passed by a State Legislature is one of fact. (S. R. DAS C. J.)

State of Bombay v. *R. M. D. Chamarbaugwalla*, 1957 SC 699 : 1957 SCJ 607 : 1957 SCA 867 : 1957 (2) MLJ 87 : 59 Bom 945.

Arts. 5, 7 and 9—Continuance of citizenship.

A person who was a citizen of India at the commencement of the Constitution will continue to be so on any later date unless he shows that under Art. 9, he voluntarily acquired citizenship of a foreign State. *Prima facie* mere migration to another country is not enough to show that he had lost Indian citizenship. (JAGANNADHA DAS J.)

Mobarik Ali Ahmed v. *State of Bombay*, 1958 SCR 328 : 1957 SC 857 : 1958 SCJ 111 : 1957 Cr. LJ 1346 : 1958 All WR 112 : 1958 SCA 665 : 61 Bom LR 58.

Art. 6—'migrate'—meaning and time.

The words 'migrated to the territory of India' mean migrated at any time before the commencement of the Constitution to a place now in the territory of India.

The word 'migration' could only be interpreted in this context to mean "come to the country with the intention of residing there permanently."

When a person has an intention to remain only temporarily in the country where he moved, but later on forms the intention of residing there permanently, he should be held to have migrated to the country at the later point of time when he forms the intention of residing there permanently.

1959 Punjab 175 Affirmed. (DAS GUPTA J.)

Shanno Devi v. *Mangal*, 1961 SC 58.

Art. 6(h) (i)—period of residence in India.

Taking the period beginning with the date on which migration became complete and ending with the date Nov. 26, 1949 as a whole, the person must be a resident during this period without any serious break. (DAS GUPTA J.)

(*ibid.*)

Art. 7—overrides Article 5.

Art. 7 clearly overrides Art. 5. It is peremptory in its scope and makes no exception unless the particular facts of a case come within the proviso to Art. 7.

1951 Patna 434 Reversed. (JAGANNADHA DAS J.)

State of Bihar v. *Amarsingh*, 1955 SCR 1259 : 1955 SC 282 : 1955 SCJ 311 : 1955 SCA 376 : 34 Pat 274.

Migration after 26.1.1950.

View of the Andhra Pradesh High Court in 1959 Andh Pra 241 that the Article contemplates migration from India to Pakistan even after 26.1.1950 criticised.

[**N.B.** The point was not pressed further as the decision of the High Court was upheld on other grounds.]

See *State of Andhra Pradesh* v. *Abdul Khader*, 1961 SC 1467.

CHAPTER III—**whether retrospective.**

Where under a valid law the rights of a person under a lease were extinguished before the Constitution, subject to his claim for compensation, the person could have no rights which would survive the Constitution, so as to enable him to invoke the provisions of Chapter III thereof even though it may be that the lease might have continued, if nothing else had happened, till after the advent of the Constitution. (AYYANGAR J.)

Guru Datta Sharma v. *State of Bihar*, 1961 SC 1684.

FUNDAMENTAL RIGHTS—**Interpretation.**

The provisions in Chapter III must be construed broadly and liberally in favour of those on whom the rights have been conferred. (BOSE J.)

Dwarakadas Shrinivas v. *Sholapur Spinning and Weaving Co. Ltd.*, 1954 SC 119 : 1954 SCR 674 : 1954 SCJ 175 : 1954 SCA 132 : 9 DLR SC 187 : 56 Bom. LR 681 : 1954 (1) MLJ 355 : 67 LW 176.

Fundamental Rights—whether can be waived.

See Basheshar Nath v. *Commissioner of Income-tax, Delhi*, 1959 SC 149 : 1959 SCJ 1207 : 35 ITR 190.

Art. 13—Power of Court.

The inclusion of Art. 13(1) and 13(2) in the Constitution appears to be a matter of abundant caution and even in their absence the Court has always the power to declare as invalid an enactment to the extent that it infringes any of the fundamental rights. (KANIA C. J.)

A. K. Gopalan v. *State of Madras*, 1950 SCR 88 : 1950 SCJ 174 : 1950 SC 27 : 1950 MWN 495 : 1950 (2) MLJ 42 : 63 LW 638 : 51 Cr. LJ 1383.

Substance and not form material.

In deciding whether an impugned legislation contravenes any of the provisions of the Constitution the court is not over persuaded by its mere appearance. The legislature cannot disobey the Constitutional prohibitions by employing indirect method of achieving exactly the same result. In such cases the Court has to look behind the names, forms and appearances to discover the true character and nature of the legislation. (MAHAJAN J.)

Dwarakadas Shrinivas v. *Sholapur Spinning and Weaving Co. Ltd.*, 1954 SC 119 : 1954 SCR 674 : 1954 SCJ 175 : 1954 SCA 132 : 9 DLR SC 187 : 56 Bom. LR 681 : 1954 (1) MLJ 355 : 67 LW 176.

Notification under an Act—validity.

The validity of a notification issued by the State, it being law, is as much vulnerable to attack as that of the Act itself on the ground that it infringes any of the fundamental rights.

If an Act is a self-contained one and the notification issued thereunder only restates the provisions of the Act, the validity of the notification cannot obviously be questioned as the validity of its contents were accepted. But if the Act confers a power on the State in general terms and the notification issued thereunder infringes one or the other of the fundamental rights, the validity of the Act cannot equally obviously prevent an attack on the notification. In the former case, the notification reflects only the provisions of a valid Act and in the latter it is the notification and not the Act that infringes the fundamental rights. (SUBBA RAO J.)

Madhubhai v. *Union of India*, 1961 SC 21.

Pleadings of State.

While considering the validity of a law the Court will not consider itself restricted to the pleadings of the State and would be free to satisfy itself whether under any provision of the Constitution, the law can be sustained. Hence the contention that where the State in its affidavit has tried to sustain the validity of a law on the ground that a challenge to its validity was barred by a certain Constitutional provision, it will not be open to the Government to say that the law could be sustained under some other provision, cannot be accepted. (MUDHOLKAR J.)

Burrakur Coal Co. Ltd. v. *Union of India*, 1961 SC 954.

Facts must first be ascertained.

In cases where the *vires* of statutory provisions are challenged on constitutional grounds, the material facts should first be clarified and ascertained. If the facts admitted or proved do not attack the impunged provisions, there will be no occasion to decide the *vires* of the said provisions and courts are and should be reluctant to decide Constitutional points merely as matters of academic importance.

(GAJENDRAGADKAR J.)

State of Bihar v. *Hurdut Roy Moti Lall Jute Mills*, 1960 SC 378 : 1960 (2) SCR 338 : 1960 SCJ 255 : 1960 BLJR 171.

Severability.

When a legislature, whose authority is subject to Constitutional limitations either with reference to subject matter on which they can legislate or character of the legistation which they can enact in respect of subjects assigned to them, in relation to the fundamental rights guaranteed under Part III, enacts a law wholly in excess of its powers, it is entirely void. When the legislation falls in part within the area allotted to it and in part outside it, it is undoubtedly void as to the latter. But whether on that account it necessarily becomes void in its entirety will depend upon whether what is valid can be separated from what is invalid and that question has to be decided by the Court on a consideration of the provisions of the Act.

(VENKATARAMA IYER J.)

R. M. D. Chamarbaugwalla v. *Union of India*, 1957 SCA 912 : 1957 SC 628 : 1957 SCJ 593 : 59 Bom. LR 973 : 1957 (2) MLJ 76 : 1957 MPC 630.

Principles applicable.

The following principles laid down by American courts apply to Indian enactments also :—

1. In determining whether the valid parts of a statute are severable from the invalid parts thereof the intention of the Legislature is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute is invalid.

2. If the two provisions are so inextricably mixed up that they cannot be separated from each other, the invalidity of a portion must result in the invalidity of the Act in its entirety. But if they are so distinct that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then that portion will be upheld.

3. Even when the two portions are distinct and separate if they all form part of a single scheme intended to be operative as a whole then also the invalidity of a portion will result in the failure of the whole.

4. Likewise when the two parts are distinct and do not form a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

5. Severability does not depend upon whether the law is enacted in the same section or in different sections ; it is not the form but the substance of the matter which is material and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein.

6. If after the invalid portion is expunged what remains of the Statute cannot be enforced without making alterations and modifications therein, the whole must be struck down as otherwise it will amount to judicial legislation.

7. In determining the legislative intent on the question of severability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. (VENKATARAMA IYER J.)

R. M. D. Chamarbaugwalla v. *Union of India*, (*ibid*).

Clause (1)—Whether retrospective.

Every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation. This rule should be applied for interpreting the Constitution also. Hence Article 13 is not retrospective. (S. R. DAS J.)

Keshavan Madhavan Menon v. *State of Bombay*, 1951 SCR 228 : 1951 SC 128 : 1951 SCJ 182 : 6 DLR SC 97 : 53 Bom. LR 458 : 1951 ALJ 23 : 1951 (1) MLJ 370 : 1951 CWN 201 : 64 LW 382 : 1951 MWN 232.

Rights and liabilities before Constitution.

Article 13(1) does not in terms make the existing laws which are inconsistent with the fundamental rights void *ab initio* or for all purposes but only to the extent they come into conflict with the fundamental rights. In other words, on and from the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of the fundamental rights. Therefore the voidness of the existing law is limited to the future exercise of the fundamental rights. The Article cannot be read as obliterating the entire operation of the inconsistent laws or to wipe them out altogether from the statute book. Such laws exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution. (S. R. DAS J.)

Keshavan Madhavan Menon v. *State of Bombay*, (*ibid*).

Cannot affect past transactions.

On this construction, the Article cannot affect any past transactions whether closed or inchoate. (MAHAJAN J.)

Keshavan Madhavan Menon v. *State of Bombay*, (*ibid*).

Nizam's Firman issued before 1950.

The Nizam was an absolute sovereign regarding all domestic matters and his word was law, whether called legislation, executive act or a judicial determination. Therefore when, under a Firman of the Nizam, a person who claimed to be the mutawalli of a Darga was dispossessed and his right to possession was held in abeyance till established in the Civil Courts and the person after the advent of the Constitution but without getting the decision of the Civil Court, applied for a writ of mandamus directing the Government to put him in possession ;

Held, dismissing the petition, that the utmost he had at the time of the Constitution was a right to be restored to possession if and when he established his right in a Court of law and the Constitution guaranteed to him only that right. If the Nizam could take away every vestige of a right by a Firman, he could equally take away a part of them and the person had on the date of the Constitution only the balance of the rights left to him. There being no decision of a civil court declaring his right he had no right to ask to be put in possession.

1953 SCR 404 Distinguished. (BOSE J.)

Director of Endowments, Hyderabad v. *Akram Ali*, 1956 SC 60.

"In so far as they are inconsistent."

Art. 13(1) does not necessarily make the whole statute invalid even after the advent of the Constitution. It invalidates only those provisions which are inconsistent with the fundamental rights guaranteed under Part III. (MUKHERJEA J.)

Habeeb Mohamed v. *State of Hyderabad*, 1953 SC 287 : 1953 SCR 661 : 1953 SCJ 361 : 1953 SCA 789 : 54 Cr LJ 1158 : 8 DLR SC 324.

Invalid law—true legal position.

Where a law infringes a fundamental right, the law does not become void *in toto* or for all purposes or for all times or, for all persons but only to the extent of 'such inconsistency.' Article 13(1) cannot be read as having obliterated the entire operation of the inconsistent law or having wiped it out altogether from the Statute Book. The true position is that the impugned law becomes, as it were, eclipsed for the time being by the fundamental right. Where as a result of a constitutional amendment the impugned Act ceases to be unconstitutional it becomes revivified and enforceable.

1951 SCR 228 Referred to. (S. R. DAS AG. C. J.)

Bikhaji Narain v. *State of Madhya Pradesh*, 1955 (2) SCR 589 : 1955 SC 781 : 1956 SCA 1 : 1956 SCJ 48 : 1956 (1) MLJ 37.

Clause (2)—"law"—constitutional amendement.

In the context of Art. 13 "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and hence a constitutional amendment taking away or abridging the rights conferred by Part III does not fall within the prohibition of Art. 13(2). (PATANJALI SASTRI J.)

Shankari Prasad Singh Deo v. *Union of India*, 1951 SC 458 : 1952 SCR 89 : 1951 SCJ 775 : 1951 ALJ 740 : 1951 (2) MLJ 683 : 64 LW 1005 : 88 CLJ 281 : 30 Pat 1176.

Effect of amendment of the Constitution on invalid statute passed after the Constitution.

A statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendement of the Constitution removing the constitutional objection and must be re-enacted.

Cooley on Constitutional Limitations Vol. I page 384 Referred to.
(MUKHERJEA J.)

Saghir Ahmed v. *State of Uttar Pradesh*, 1954 SC 728 : 1955 SCR 707 : 1954 SCJ 819 : 1954 SCA 1218 : 68 LW 8 : 1954 (2) MLJ 628 : 1955 ALJ 38 : 1955 All WR 23.

See also *Deep Chand* v. *State of Uttar Pradesh*, 1959 SC 648 : 1959 SCA 377.

Act struck down as void—effect.

The constitutional invalidity of a part of S. 13 (b) of the Bombay Prohibition Act having been a declared by the Supreme Court in *Balsara's Case*, that part of the section ceases to have any legal effect in judging cases of citizens and has to be regarded as null and void in determining whether a citizen is guilty of an offence or not. The view that the effect of the judgment is to to engraft an exception or proviso to the section in the light of the decision and that the onus of proving the exception is on the accused person is not a correct approach to the question, for the court has no power to re-write the section. (MAHAJAN C. J.)

Behram Kurshid v. *State of Bombay*, 1955 SCR 613 : 1955 SC 123 : 1955 SCA 1 : 1955 SCJ 73 : 1954 MWN 985 : 1955 Cri LJ 215 : 1955 (1) MLJ 32 ; 57 Bom LR 575 : 1955 (1) Andh WR 32 : 1955 Andh LT (Cri) 1.

Art. 14—Principles stated.

Principles or rules of guidance for the interpretation of the Article summarised.

See *Jyoti Pershad* v. *Administrator for the Union Territory of Delhi*, 1961 SC 1602.

Nature of the right conferred.

The command of the Article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy.

The next thing to notice is that the benefit of the Article is not limited to citizens but is available to any person within the territory of India.

In the third place it is to be observed that the Article is an injunction to both the legislative as well as the executive organs of the State and the other subordinate authorities by virtue of Art. 12. (S. R. DAS C. J.)

Basheshar Nath v. *Commissioner of Income-tax, Delhi*, 1959 SC 149 : 1959 SCJ 1207 : 35 ITR 190.

Not retrospective.

The Constitution has no retrospective effect and even if a law is in any sense discriminatory, it must be held to be valid for all past transactions and for enforcement of rights and liabilities accrued before the coming into force of the Constitution. (MUKHERJEA J.)

Habeeb Mohamed v. *State of Hyderabad*, 1953 SC 287 : 1953 SCR 661 : 1953 SCJ 361 : 1953 SCA 789 : 8 DLR SC 324 : 54 Cr LJ 1158.

Discrimination by laws of different legislatures.

The constitutionality of an enactment has to be examined with reference to the specific legislation which is impugned. It is conceivable that when the same legislature enacts two different laws but in substance they form one legislation, it might be open to the Court to disregard the form and treat them as one law and strike it down if in their conjunction they result in discrimination. But such a course is not open where the two laws sought to be read in conjunction are by different legislatures.

Art. 14 does not authorise the striking down of a law of one State on the ground that, in contrast with law of another State on the same "subject" its provisions are discriminatory. Nor can a law of the Centre or of a State dealing with similar subjects be held to be unconstitutional by a process of comparative study of the provisions of the two enactments. (VENKATARAMA IYER J.)

State of Madhya Pradesh v. *G. C. Mandawar*, 1954 SC 493 : 1955 SCR 599 : 1954 SCJ 503 : 1954 SCA 767 : 1954 (2) MLJ 51.

Applicability to procedural laws.

Art. 14 not only guarantees equal protection as regards substantive laws but procedural laws also come within its ambit. The implication of the Article is that all litigants similarly situated are entitled to avail themselves of the same procedural rights for relief, and for defence, with like protection and without discrimination. (MAHAJAN C. J.)

Meenakshi Mills Ltd., v. *A. V. Viswanatha Sastri*, 1955 SCR 787 : 1955 SC 13 : 1954 SCA 1271 : 1955 SCJ 62 : 26 ITR 713 : 1955 Andh WR 21 : 1955 (1) MLJ 21.

Applicability to taxation statutes.

The guarantee of the equal protection of the laws extends even to taxing statutes. But it does not mean that every person should be taxed equally. If the taxation, generally speaking, imposes a similar burden on every one with reference to that particular kind and extent of property, on the same basis of taxation, the law shall not be open to attack on the ground of inequality, even though the result of the taxation may be that the total burden on different persons may be unequal. But if the same class of property similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property.

(SINHA C. J.)

K. T. Moopil Nair v. *State of Kerala*, 1961 SC 552.

Permissible classification.

It is well established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order to pass the test of permissible classification two conditions must be fulfilled, namely (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question.

The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of the Supreme Court that Art. 14 condemns discrimination not only by a substantive law but also by a law of procedure.

Case law referred. (S. R. DAS J.)

Budhan Chowdhry v. *State of Bihar*, 1955 (1) SCR 1045 : 1955 SC 191 : 1955 SCA 173 : 1955 SCJ 163 : 1955 Cri LJ 374 : 1955 Andh. LT 135 : 1955 All WR 241 : 1955 BLJR 249 : 1955 ALJ 309.

Principles to be borne in mind.

The decisions of the Supreme Court establish :—

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself ;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles ;

(c) that it must be presumed that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds ;

(d) that the Legislature is free to recognise the degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest :

(e) that in order to maintain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times, and may assume every state of the facts which can be conceived as existing at the time of legislation ; and

(f) that while good faith and knowledge of the existing condition on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitu-

tionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. (S. R. DAS C. J.)

Ramakrishna Dalmia v. *Justice Tendolkar*, 1958 SC 538 : 1959 SCJ 147 : 1958 SCA 754 : 61 Bom LR 192 : 1959 (1) MLJ 67.

Presumption as to constitutionality—when does not arise.

It is true that the presumption is in favour of the constitutionality of a legislative enactment but when on the face of a statute there is no classification at all and no attempt has been made to select any individual or group with reference to any differentiating attribute peculiar to that individual or group and not possessed by others, the presumption is of little or no assistance to the State. To carry the presumption to the extent of holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminatory legislation is to make the equal protection clause a mere rope of sand.

(1897) 165 U.S. 150 Referred to. (PATANJALI SASTRI C. J.)

Ram Prasad Narayan Sahi v. *State of Bihar*, 1953 SCR 1129 : 1953 SC 215 : 1953 SCJ 267 : 1953 SCA 578 : 8 DLR SC 289 : 32 Pat 375 : 1 BLJ 318.

Equality—when not violated.

Equality will not be violated if the statute operates equally on all persons included in the group and the classification is not arbitrary or capricious. (MUKHERJEA J.)

Kathi Raning Rawat v. *State of Saurashtra*, 1952 SC 123 : 1952 SCR 435 : 1952 SCJ 168 : BLR 1952 SC 157 : 1952 MWN 762 : 7 DLR (SC) 256 : 1952 SCA 245 : 53 Cr. LJ 805.

Legislation enacted for the achievement of a particular object or purpose need not be all embracing. It is for the legislature to determine what categories it would embrace within the scope of a legislation and merely because certain categories which would stand on the same footing as those which are covered by the legislation are left out would not render legislation which has been enacted, in any manner discriminatory and violative of the fundamental right guaranteed under Art. 14. (BHAGWATI J.)

Sakhawant Ali v. *State of Orissa*, 1955 SCR 1004 : 1955 SC 166 : 1955 SCA 353 : 1955 SCJ 262 : 21 Cut LT 88.

Classification on geographical basis.

The Madhya Bharat Medical College Rule requiring capitation fee from non-Madhya Bharat Students proceeds on a classification based on residence within the State. The object of the classification underlying the impugned rule is clearly to help to some extent students who are residents of Madhya Bharat in the prosecution of their studies and it cannot be disputed that it is quite a legitimate and laudable objective for a State to encourage education within its borders.

The classification is thus based on a ground which has a reasonable relation to the subject matter of the legislation, and is in consequence not open to attack under Art 14.

1953 SCR 254 Rel. on. (VENKATARAMA IYER J.)

Joshi v. *State of Madhya Bharat*, 1955 SCR 1215 : 1955 SC 334 : 1955 SCA 511 : 1955 SCJ 298 : 1955 MWN 406.

Tenancy Legislation—Part of a State.

A classification may properly be made on territorial basis if it is germane to the purposes of the enactment. Having regard to the fact that the conditions of tenants vary from locality to locality, a tenancy legislation restricted to a portion of a State cannot be held on that ground alone to contravene Art. 14. What Art. 14 prohibits is unequal treatment of persons similarly situated and therefore before a person can claim protection thereunder it is incumbent on him to show that conditions prevailing in the other areas of the State are similar to those obtaining in his area. (VENKATARAMA IYER J.)

Kishan Singh v. *State of Rajasthan*, 1955 (2) SCR 531 : 1955 SC 795 : 1956 SCA 402 : 1956 SCJ 14.

Mere differentiation.

Mere differentiation or inequality of treatment does not *per se* amount to discrimination within the inhibition of the equal protection clause. To attract its operation, it is necessary to show that the selection or differentiation is unreasonable or arbitrary ; that it does not rest on any rational basis having regard to the object which the legislature has in view. (MUKHERJEA J.)

Ameerunnissa Begum v. *Mahboob Begum*, 1953 SC 91 : 1953 SCR 404 : 1953 SCJ 61 : 1953 SCA 565 : (1953) Hyd. 98.

Decision as to when Act should be given operation.

The decision as to from what date a legislation should be given operation is exclusively for the Legislature to determine and the propriety of that determination is not open to question in Courts.

Indersingh v. *State of Rajasthan*, 1957 SCR 605 : 1957 SC 510 : 1957 SCA 735 : 1957 SCJ 376.

Government Contracts.

It is perfectly open to the Government to choose a person to their liking, to fulfil contracts which they wish to be performed. Where one person is chosen rather than another, the aggrieved party cannot claim the protection of Art. 14. (HIDAYATULLAH J.)

C. K. Achuthan v. *State of Kerala*, 1960 (1) SCA 33.

S. 197 Cr. Pr. Code.

Art. 14 does not render S. 197 Criminal Procedure Code, *ultra vires* as the discrimination is based upon a rational classification. Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard. (CHANDRASEKHARA IYER J.)

Matajog Dobey v. *Bhari*, 1955 (2) SCR 925 : 1956 SC 44 : 1956 SCA 22 : 1956 SCJ 110 : 1955 (20) ITR 941 : 1956 Cri LJ 140 : 1956 (1) MLJ 79.

Private dispute.

The legislature cannot intervene in a dispute purely between private parties which is a matter for determination by duly constituted courts to which is entrusted, in every free and civilized society, the important function of adjudicating on disputed legal rights, after observing the well established procedural safeguards which include the right to be heard, the right to produce witnesses and so forth,

by making a "law" to decide the dispute. Such legislation will be discriminatory and will be void under Art. 14.

[The Bihar Sathi Lands (Restoration) Act, 1950 held void.
1952 Patna 194 Reversed.] (PATANJALI SASTRI C. J.)

Ram Prasad Narayan Sahi v. *State of Bihar*, 1953 SCR 1129 : 1953 SC 215 : 1953 SCJ 267 : 1953 SCA 578 : 8 DLR SC 289 : 32 Pat 375 : 1 BLJ 318.

Arts. 15(1) and 16(2)—"discriminate."

The expression "discriminate against" used in Arts. 15(1) and 16(2) means "to make adverse distinction with regard to ; to distinguish unfavourably from others." Discrimination thus involves an element of unfavourable bias. If such bias is disclosed and is based on any of the grounds mentioned in Arts. 15 and 16, the statute will, without more, incur condemnation unless it is saved by one or other of the provisos to those articles. (PATANJALI SASTRI C. J.)

Kathi Raning Rawat v. *State of Saurashtra*, 1952 SCR 435 : 1952 SC 123 : 1952 SCJ 168 : BLR 1952 SC 157 : 1952 SCA 245 : 7 DLR SC 256 : 1952 MWN 762 : 53 Cr LJ 805.

Place of birth.

Residence and place of birth are two distinct conceptions with different connotations both in law and in fact, and when Art. 15(1) prohibits discrimination based on the place of birth, it cannot be read as prohibiting discrimination based on residence.

Domicile of a person means his permanent home.

Whether the expression used is 'domicile of origin' or 'domicile of birth', the concept involved in it is something different from what the words 'place of birth' signify. If 'domicile of birth' and 'place of birth' cannot be taken as synonymous then the prohibition enacted in Art. 15(1) against discrimination based on place of birth cannot apply to a discrimination based on domicile. The rule in the Madhya Bharat Medical College requiring payment of capitation fees by non-Madhya Bharat students is not repugnant to Art. 15(1) for when the authorities referred to domicile in the rule they were thinking really of residence.

(VENKATARAMA IYER J.)

Joshi v. *State of Madhya Bharat*, 1955 SCR 1215 : 1955 SC 334 : 1955 SCA 511 : 1955 SCJ 298 : 1955 MWN 406.

Communal election.

Any law providing for elections on the basis of separate electorates for members of different religious communities offends against Art. 15(1) which clearly extends to political as well as other rights and any election held after the Constitution in pursuance of such a law, subject to cl. (4), must be held to be void. (PATANJALI SASTRI C. J.)

Nain Sukh Das v. *State of U. P.*, 1953 SC 384 : 1953 SCR 1184 : 1955 SCJ 546 : 1953 SCA 594 : 8 DLR SC 413 : 1953 (2) MLJ 257.

Art. 16 cl. (1)—applicability to contracts with Government.

Art. 16(1) both in its terms and in the collocation of the words, indicates that it has reference to employment of persons in service rather than as contractors. (HIDAYATULLAH J.)

C. K. Achuthan v. *State of Kerala*, 1960 (1) SCA 33.

Communal G.O.

The communal G.O. of the Government of Madras fixing proportions in which candidates from various communities are to be selected to posts under the Government is repugnant to Art. 16 (1) and is not sanctioned by Cl. (4) and is hence void. (S. R. DAS J.)

Venkatramana v. *State of Madras*, 1951 SC 229 : 1951 SCJ 318 : 6 DLR (SC) 260 : 64 LW 434 : 1951 (1) MLJ 625 : 1951 ALJ 105 : 1951 RLW 331 : 1951 KLT 49.

Power of Government to choose its employees under prescribed rules.

Art. 16 is an instance of the application of the general rule of equality laid down in Art. 14 with special reference to the opportunity for appointment and employment under the Government. Like all other employers Government are entitled to lay down prerequisite conditions of appointment and to pick and choose from amongst a large number of candidates offering themselves for employment. (SINHA J.)

Banarsidas v. *State of Uttar Pradesh*, 1956 SCR 357 : 1956 SC 520 : 1956 SCA 702 : 1956 SCJ 529 : 1956 ALJ 517 : 1956 BLJR 511 : 1956 SCC 299 : 1956 All WR 421.

Equality in promotion.

Equality of opportunity in matters of promotion must mean equality as between members of the same class of employees and not equality between members of separate and independent classes. (DAS GUPTA J.)

All India Station Masters' and Assistant Station Masters' Association v. *General Manager, Central Railway*, 1960 SC 384 : 1960 (2) SCR 311 : 1960 SCJ 344 : 1960 (1) SCA 700.

Cls. (1), (2) and (4)—promotion to selection posts.

Matters relating to employment cannot be confined only to the initial matters prior to the act of employment and hence promotion to selection posts is included both under Art. 16 (1) and (2).

1960 All 484 Not Approved ; (1958) Bom. 1266 and 35 Pat 1 Approved.

It is true that Art. 16(4) does not cover the entire field covered by Art. 16(1) and (2), for instance conditions of service relating to employment, but promotion to a selection post which is included in Art. 16(1) and (2) is covered by Art. 16(4) also.

Art. 16(4) must be construed on the basis that both "appointments" and "posts" to which its operative clause refers are appointments and posts in the services under the State and it would be unreasonable to treat the word "posts" as a term of art and to clothe it inexorably with the meaning of ex-cadre posts.

The condition precedent for the exercise of the power conferred by Art. 16(4) may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. Hence the power of reservation conferred by Art. 16 (4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts.

Circulars d/27.4.59 and 12.6.59 of the Railway Board providing for reservation for Scheduled Castes and Scheduled Tribes in promotion vacancies, *held*, protected by Art. 16(4).

1961 Mad 35 Reversed. (GAJENDRAGADKAR J.)

General Manager, Southern Railway v. *Rangachari*, 1961 (2) MLJ 71 : 1961 (2) SCJ 424 : 1961 (2) SCA 460.

Art. 19—Applicability.

Article 19 presupposes that the citizen to whom the possession of the fundamental rights is secured retains the sub-stratum of personal freedom on which alone the enjoyment of these rights necessarily rests. Where as a penalty for committing a crime or otherwise, he is lawfully deprived of his freedom there can no longer be any question of his exercising or enforcing the rights referred to in Cl. (1). (PATANJALI SASTRI J.)

A. K. Gopalan v. *State of Madras*, 1950 SCR 88 : 1950 SCJ 174 : 1950 SC 27 : 1950 MWN 495 : 1950 (2) MLJ 42 : 63 LW 638 : 51 Cr. LJ 1383.

Art. 19(1) (f)—when attracted.

The Article postulates the existence of property over which these rights can be exercised.

This article deals with substantial and substantive rights and not with illusory phantoms of title. When every form of enjoyment which normally accompanies an interest in this kind of property is taken away leaving the mere husk of title, Art. 19(1) (f) is not attracted. (BOSE J.)

State of Bombay v. *Bhanji Munji*, 1955 SCR 777 : 1955 SC 41 : 1954 SCA 1286 : 1955 SCJ 10 : 57 Bom LR 595.

The decision in *State of Bombay* v. *Bhanji Munji*, 1955 (1) SCR 777 holding, on the analogy drawn from Art. 21, that when the property is requisitioned within the meaning of Art. 31 the operation of Art. 19 is excluded, no longer holds the field after the Constitution (Fourth Amendment) Act, 1955.

Hence a law made, thereafter, depriving a citizen of his property will be void unless it complies with the provisions of cl. (5) of Art. 19. (SUBBA RAO J.)

Kochunni v. *States of Madras and Kerala*, 1960 SC 1080 : 1960 Ker LJ 1077 : 1960 (2) SCA 412.

The article applies equally to concrete as well as abstract rights of property.

Opinion of PATANJALI SASTRI C. J. in 1954 SCR 587 Criticised. (MUKHERJEA J.)

Commissioner H. R. E. Madras v. *Lakshmindra Thirtha Swamiar*, 1954 SC 282 : 1954 SCR 1005 : 1954 SCJ 335 : 1954 SCA 415 : 1954 (1) MLJ 596 : 67 LW 1220 : 1954 MWN 363 : 20 CLT 250 : 1954 VLJ SC 1.

Remedy against private individuals.

Neither Art. 19 (1) (f) nor Art. 31 (1) is intended to provide protection against infringement by private individuals for which remedies should be sought under the ordinary law. (PATANJALI SASTRI C. J.)

Shamdasani v. *Central Bank of India Ltd.*, 1952 SC 59 : 1952 SCR 391 : 1952 SCJ 29 : 1952 1 MLJ 423 : BLR 1952 SC 93 : 1952 MWN 102 : 65 LW 357 : 54 Bom LR 403 : 7 DLR (SC) 81 : 1952 SCA 36.

Right of quasi-permanent allottee.

The right of a quasi-permanent allottee under the Evacuee Property Administration law is not property so as to attract Art. 19(1)(f) and hence an infringement of that right cannot give rise to a petition under Art. 32.

Observation in 59 Punj LR 103 Not Approved. (JAGANNADHA DAS J.)

Amar Singh v. *Custodian of Evacuee Property, Punjab*, 1957 SC 599 : 1958 SCA 171 : 1957 SCJ 574.

Law fixing fair rent.

The fundamental right which a citizen has to hold and enjoy property imports only a right to recover reasonable rent when the lands are cultivated by a tenant and a legislation whose object is to fix fair and equitable rent cannot be said to invade that right even when it is retrospective in operation.

(VENKATARAMA IYER J.)

Kishan Singh v. *State of Rajasthan*, 1955 (2) SCR 531 : 1956 SCA 402 : 1956 SCJ 14 : 1956 SC 795.

Indefinite deprivation of possession.

When a law deprives a person of possession of his property for an indefinite period of time merely on the subjective determination of an executive officer, it cannot be described as a reasonable restriction, because it completely negatives the fundamental right by making its enjoyment depend on the mere pleasure and discretion of the executive, the citizen affected having no right to have recourse to the Civil Courts. (MAHAJAN J.)

Raghubir Singh v. *Court of Wards, Ajmer*, 1953 SCR 1049 : 1953 SC 373 : 1953 SCA 629 : 8 DLR SC 490 : 1954 MWN 433.

Where a law provides that an administrative authority can in its own discretion and on its subjective determination assume the superintendence of the property of a landlord alleged to interfere habitually with the rights of his tenants, the law clearly infringes the fundamental right of the landlord guaranteed by Art. 19(1)(f).

[S. 112, Ajmer Tenancy and Land Reforms Act, 1950 *held* void.]

(MAHAJAN J.)

Raghubir Singh v. *Court of Wards, Ajmer*, (*ibid*).

Art. 19(1) (f) and Art. 19(5)—deprivation of right to evict tenant.

It is no doubt true that a right in the owner of a building to evict a tenant and enter into actual occupation is included in the right to hold property under Art. 19(1)(f). But the "freedom" to "hold property" is not absolute but is subject, under Art. 19(5), to "reasonable restrictions" being placed upon it "in the interests of the general public".

The criteria for determining the degree of restriction which would be considered reasonable are by no means fixed or static, but must obviously vary from age to age and be related to the adjustments necessary to solve the problems which the communities face from time to time. In construing and in particular judging the validity of the laws which the legislature, in its wisdom, considers as necessary for the solution of human problems, the Courts have necessarily to approach it from the point of view of furthering the social interest which it is the purpose of the Legislature to promote, for the Courts are not in these matters

functioning as it were *in vacuo*, but as parts of a society which is trying by enacted laws to solve its problems and achieve social concord and peaceful adjustment and thus furthering the moral and material progress of the community as a whole. (RAJAGOPALA AYYANGAR J.)

(Section 19 of the Slum Areas Improvement and Clearance Act, 1956 *held* valid.)

Jyoti Pershad v. *Administrator, Union Territory of Delhi*, 1961 SC 1602.

Art. 19(1) (g) and (6)—Pre-Constitution Licensing statutes.

In deciding whether a law passed in 1866 satisfies the test of Constitutionality based on Art. 19(1) (g) and (6), the Court should take the section of the enactment as a whole and see whether on a fair reading of the section there is guidance for the licensing authority in the matter of granting and refusing licences or whether the power is arbitrary. If such guidance can be found, there would be no reason for striking it down simply because the section has not been worded in a manner which would show immediately that considerations arising from the provisions of Art. 19(1)(g) and (6) were in mind, for such considerations naturally could not be in the mind of the legislature in 1866. (WANCHOO J.)

Kishan Chand Arora v. *Commissioner of Police, Calcutta*, 1961 SC 705.

Right to carry on business.

There is no fundamental right in a citizen to carry on business wherever he chooses and his right must be subject to any reasonable restriction imposed by the executive authority in the interest of public convenience. (GHULAM HASAN J.)

T. B. Ibrahim v. *Regional Transport Authority, Tanjore*, 1953 SC 79 : 1953 SCR 290 : 1953 SCJ 31 : 1953 SCA 277 : 8 DLR SC 141 : 1953 (1) MLJ 205.

Right to hold a fair.

The holding of an annual fair is an occupation or business within the meaning of Art. 19 (1) (g) and therefore a person has a fundamental right to engage in the occupation on his land. (BOSE J.)

Ganpati Singhji v. *State of Ajmer*, 1955 SCR 1065 : 1955 SC 188 : 1955 SCA 252 : 1955 SCJ 119.

Publishing of text books.

There is no fundamental right in a publisher that any of the books printed and published by him should be prescribed as text books by school authorities or if they are once accepted as text books they cannot be stopped in future.

So far as the recognised schools are concerned, the choice of text books rests entirely with the Government. The publishers have to offer their books for inspection and approval and they have no right to insist on any of their books being accepted. There is merely a chance of any of their books being approved as text books and there is no fundamental right guaranteeing them. (MUKHERJEA C. J.)

Ram Jawaya Kapur v. *State of Punjab*, 1955 (2) SCR 225 : 1955 SC 549 : 1955 SCJ 504 : 1955 (2) MLJ 59 : 57 Pun LR 444 : 1955 MWN 973 : 1955 SCA 577.

Right to use highway for Motor Transport business.

According to English law, applied in India, a highway has its origin, apart from Statute, in dedication either express or implied by the owner of land of a

right of passage over it to the public and acceptance of that right by the public. The fact that members of the public have a right of passing and repassing over a highway does not mean however that all highways could legitimately be used as foot passages only and that any other user is possible only with the permission or sufferance of the State. The use of motor vehicles in modern times, as means of locomotion and transport cannot, on the principle stated above, amount to an unwarrantable extension of the accustomed user to which the highway is subjected.

Once the position is accepted that a member of the public is entitled to ply motor vehicles on the public road as an incident of his right of passage over a highway, the question is really immaterial whether he plies a vehicle for pleasure or for the purpose of trade or business. It cannot be said that the user of a public road for purposes of trade is an extraodinary or special use of the highway which can be acquired only under sanction from the State.

The State as trustee on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally ; but subject to such limitations the right of a citizen to carry on business in transport vehicles on public pathways cannot be denied to him on the ground that the State owns the highways.

1953 Mad 279 Approved.

Hence within the limits imposed by State regulations any member of the public can carry on the business of transporting passengers with the aid of motor vehicles. To this carrying on of the trade or business the guarantee in Art. 19(1)(g) is attracted and a citizen can legitimately complain if any legislation takes away or curtails the right any more than is permissible under clause (6). (MUKHERJEA J.)

Saghir Ahmed v. *State of Uttar Pradesh*, 1954 SC 728 : 1955 SCR 707 : 1954 SCJ 819 : 1954 SCA 1218 : 68 LW 8 : 1954 (2) MLJ 628 : 1955 ALJ 38 : 1955 All WR 23.

Compulsory exhibition of approved films.

Condition 4 (a) and special condition 3 imposed by 2 notifications of the State of Madras dt/-. 28.3.48 and 15.9.48 regarding compulsory exhibition in cinema theatres of approved films of such length (not less than 2000 feet) and for such length of time as may be prescribed by the Government, are void inasmuch as they contravene Art. 19(1)(g).

1952 Mad 120 Reversed. (GHULAM HASAN J.)

R. M. Seshadri v. *District Magistrate, Tanjore*, 1954 SC 747 : 1955 (1) SCR 686 : 1954 SCJ 842 : 1954 SCA 1214 : 1954 (2) MLJ 717 : 68 LW 1 : 1954 MWN 923 : 1954 VLJ 71.

Illegal imposition of licence fee.

There is a difference between a tax like the income-tax and a licence fee for carrying on a business. A licence fee on a business not only takes away the property of the licensee but also operates as a restriction on his right to carry on business. If therefore the licence fee cannot be legally justified, no question of its reasonableness can arise, for an illegal impost must always be an unreasonable restriction and will infringe the fundamental right of the citizen to carry on his occupation, trade or business guaranteed under Art. 19(1)(g). (DAS J.)

Mohammed Yasin v. *Town Area Committee, Jalalabad*, 1952 SC 115 : 1952 SCR 572 : 1952 SCJ 162 : 1952 MWN 492 : BLR 1952 SC 149 : 1952 ALJ 313.

Gambling and competitions of skill.

Trade and commerce protected by this Article are only those activities which could be regarded as lawful trading activities. As gambling is not trade but *res extra commercium* it does not fall within the purview of the article, but competitions involving substantial skill are business activities protected by Art. 19 (1) (g). (VENKATARAMA IYER J.)

R. M. D. Chamarbaugwalla v. *Union of India*, 1957 SC 628 : 1957 SCJ 593 : 59 Bom. LR 973 : 1957 (2) MLJ 76 : 1957 (2) An WR 76 : 1957 MPC 530 : 1957 SCA 912.

Gambling.

Gambling activities are not protected by Art. 19(1) (g) and therefore the validity of an Act (the Bombay Lotteries and Prize Competition Control and Tax Act, 1948) dealing with betting and gambling does not have to be decided by the yardstick of reasonableness and public interest laid down in Art. 19(6).

1956 Bombay 1 Reversed. (S. R. DAS C. J.)

State of Bombay v. *R. M. D. Chamarbaugwalla*, 1957 SC 699 : 1957 SCJ 607 : 1957 SCA 867 : 1957 (2) MLJ 87 : 59 Bom LR 945.

Government contracts.

A contract held from Government stands on no different footing from a contract held from a private party. The breach of contract, if any, may entitle the person to sue for damages or, in appropriate cases, even specific performance but not to complain of a deprivation of the right contemplated by Art. 19(1) (g). (HIDAYATULLAH J.)

C. K. Achuthan v. *State of Kerala*, 1960 (1) SCA 33.

Cl. (2) to Cl. (6)—burden of proof.

When an enactment on the face of it is found to violate a fundamental right guaranteed under Art. 19(1), it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in clauses (2) to (6). It is not for the citizen to prove negatively that the legislation is not reasonable and is not conducive to the welfare of the community. (MUKHERJEA J.)

Saghir Ahmed v. *State of Uttar Pradesh*, 1954 SC 728 : 1955 SCR 707 : 1954 SCJ 819 : 1954 SCA 1218 : 68 LW 8 : 1954 (2) MLJ 628 : 1955 All WR 23 : 1955 ALJ 38.

"Restriction" includes prohibition.

There can be no doubt that the makers of the Constitution intended the word "restriction" as used in clause (2) to include cases of "prohibition" also. Hence the contention that a law prohibiting the exercise of a fundamental right is in no case saved cannot be accepted.

However, when the restriction reaches the stage of prohibition special care has to be taken by the Court to see that the test of reasonableness is satisfied. The greater the restriction the more the need for scrutiny by the Court. (DAS GUPTA J.)

Narendra Kumar v. *Union of India*, 1960 SC 430 : 1960 (2) SCR 375 : 1960 SCJ 214.

Reasonable restrictions.

The law providing reasonable restrictions on the exercise of the right may contain substantive provisions as well as procedural provisions. While the reasonableness has to be considered with regard to the exercise of the right it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law. (KANIA C. J.)

Dr. N. B. Khare v. *State of Delhi*, 1950 SC 211 : 1950 SCR 519 : 1950 SCJ 328 : 1950 ALJ 506 : 1950 MWN 440.

Duty of Court.

The test of reasonableness, whenever prescribed, should be applied to each individual statute impugned and no general standard can be laid down. The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part and the limit to their interference with the legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all and that the majority of the elected representatives of the people in authorising the imposition of the restrictions considered them to be reasonable. (PATANJALI SASTRI C. J.)

State of Madras v. *V. G. Row*, 1952 SC 196.

Surrounding circumstances.

The Court in judging the reasonableness of a law will necessarily see not only the surrounding circumstances but all contemporaneous legislation passed as part of a single scheme. The reasonableness of the restriction and not of the law has to be found out, and if restriction is under one law but countervailing advantages are created by another law passed as part of the same legislative plan, the Court should not refuse to take that other law into account.

1952 SCR 597 Ref. to (HIDAYATULLAH J.)

Lord Krishna Sugar Mills v. *Union of India*, 1959 SC 1124.

Excessive restriction.

The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of the public. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed by Art. 19(1)(g) and the social control permitted by Cl. (6), it must be held to be wanting in that quality. (MAHAJAN J.)

Chintaman Rao v. *State of Madhya Pradesh*, 1950 SCR 759 : 1951 SC 118 : 1950 SCJ 571 : 6 DLR (SC) 49 : BLR 1951 SC 118 : 1951 ALJ 82 : 64 LW 370 : 1951 CWN 183.

Art. 19(2).

In applying the test of reasonableness it will also be necessary to consider whether the restraint caused by the law is more than is necessary in the interests of the general public. (DAS GUPTA J.)

Narendra Kumar v. *Union of India*, 1960 SC 430 : 1960 (2) SCR 375 : 1960 SCJ 214.

Responsibility of Court.

Though it is true that "the legislature is the best judge of what is good for the community, by whose suffrage it comes into existence" and that that should be the proper approach for the Court in proceeding to determine the reasonableness of a law, the ultimate responsibility for determining its validity rests with the Court and the Court must not shrink from that solemn duty cast upon it by the Constitution. (S. R. DAS C. J.)

Mohd. Hanif Quareshi v. *State of Bihar*, 1958 SC 731 : 1958 SCJ 975 : 1958 SCA 783.

"In the interests of the general public."

The words "in the interests of the general public" cannot be contended to mean "in the interests of the general public of the whole of India." They mean nothing more than "in the public interest" and it may well be that a legislation affecting a limited class of persons or a limited area might be in the public interests though the public of other parts of India may not be affected by such legislation. 1952 Cal 273 Approved. (SUBBA RAO J.)

Kochunni v. *States of Madras and Kerala*, 1960 SC 1080 : 1960 Ker LT (SC) 31 : 1960 Ker LJ 1077.

Clause (6)—effect of First Amendment Act.

The new clause in Art. 19 (6) has no doubt been introduced by the Constitution (First Amendment) Act, 1951 with a view to provide that a State can create a monopoly in its own favour in respect of any trade or business. But the amendement does not make the establishment of such monopoly a reasonable restriction within the meaning of first para of clause (6).

Hence a statute passed before the Constitution (First Amendment) Act and creating such a monopoly will not be a reasonable restriction within the meaning of clause (6) as it existed before the amendment. (MUKHERJEA J.)

Saghir Ahmed v. *State of Uttar Pradesh*, 1954 SC 728 : 1955 SCR 707 : 1954 SCJ 819 : 1954 SCA 1218 : 68 LW 8 : 1954 (2) MLJ 628 : 1955 All WR 23 : 1955 ALJ 38.

Monopoly—how created.

The plea that the State intending to carry on trade or business must itself enact the law authorising it to carry on business is devoid of force. For the right of the State to carry on business to the exclusion of others does not arise by virtue of Art. 19(6). It is recognised by Art. 298 and the exercise of the power to exclude competitors in the context of fundamental rights is secured from attack under Art. 19(6). (SHAH J.)

Narayanappa v. *State of Mysore*, 1960 SC 1073 : 1960 (3) SCR 742 : 1961 (1) MLJ 5 : 1961 (1) SCJ 7.

Art. 19(6) (ii) & (iii)—Monopoly—Road Transport—Motor Vehicles Act.

Under Art. 19 (6) (ii), the State can make law for carrying on business or service to the exclusion complete or partial of citizens or otherwise. The word 'service' is wide enough to take in not only the general motor service but also the species of motor service.

S. 68C, Motor Vehicles Act, 1939, as amended in 1956 does not exceed the limits prescribed by Art. 19(6) (ii). (SUBBA RAO J.)

Kondala Rao v. *A. P. S. R. T. Corporation*, 1961 SC 82.

Art. 25(1)—sacrifice of cow by Muslims.

The sacrifice of a cow on *Bakrid* day cannot be said to be an obligatory act for a *Mussalman* to exhibit his religious belief and idea, so as to be a religious practice protected by Art. 25 (1). (S. R. DAS C. J.)

Mohd. Hanif Quareshi v. *State of Bihar*, 1958 SC 731 : 1958 SCJ 975 : 1958 SCA 783.

Art. 25 (2) (a).

What Art. 25(2)(a) contemplates is not State regulation of the religious practices as such which are protected unless they run counter to public health or morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices. (MUKHERJEA J.)

Ratilal Panachand Gandhi v. *State of Bombay*, 1954 SC 388 : 1954 SCR 1055 : 1954 SCJ 480 : 1954 SCA 538 : 56 Bom LR 1184 : 1954 (1) MLJ 718.

Arts. 25 (2) (b) and 26 (b)—harmonius construction—Madras Temple Entry Authorisation Act, 1947.

"Matters of religion" in Art. 26 (b) will include the right to exclude persons who are not entitled to participate in the worship according to the tenets of the institution. But the article must be read subject to Art. 25 (2) (b), for the right conferred by Art. 25 (2) (b) must be available whether it is sought to be exercised against an individual under Art. 25 (1) or a denomination under Art. 26 (b). Art. 25 (2) (b) applies to denominational institutions also. But the right conferred by Art. 25 (2) (b) must necessarily be subject to some limitation or regulations and one such regulation must arise in the process of harmonising the right conferred by Art. 25 (2) (b) with that protected by Art. 26 (b).

The trustees of a denominational temple filed a suit for a declaration that their temple did not fall within the purview of the Madras Temple Entry Authorisation Act, 1947. The suit was dismissed. On appeal, the High Court held that Art. 25 (2) (b) applied to the case and that therefore under the Act all classes of Hindus were entitled to enter the temple for worship but held that the right of the trustees to exclude all members of the public during certain ceremonies and occasions when members of a particular denomination were alone entitled to participate was protected by Art. 26 (b) and modified the decree of the lower court specifying those occasions. The trustees appealed and the respondent cross-objected to the modifications in the decree. *Held* (while dismissing both the appeal and the cross objections), the decree of the High Court which struck a just balance between the rights of the Hindu public under Art. 25 (2) (b) and of a denomination under Art. 26 (b) was not open to objection.

1958 Mad. 85 Affirmed. (VENKATARAMA IYER J.)

Venkataramana Devaru v. *State of Mysore*, 1958 SCR 895 : 1958 SC 255 : 1958 SCJ 382 : (1958) 1 An WR 109 : (1958) 1 MLJ 109.

Art. 26—denomination.

Art. 26 contemplates not merely a religious denomination but also a section thereof, and therefore a Math or the spiritual fraternity represented by it, like the followers of Madhvacharya, or the followers of Ramanuja or Sankara, can legitimately come within the purview of this Article. (MUKHERJEA J.)

Commissioner, Hindu Religious Endowments Madras v. *Lakshmindra Thirtha Swamiar*, 1954 SC 282 : 1954 SCR 1005 : 1954 SCJ 335 : 1954 SCA 415 : 1954 (1) MLJ 596 : 67 LW 1220 : 1954 MWN 363 : 20 CLT 250.

Religious practices.

The protection under the Article must be confined to such religious practices as are an essential and an integral part of the religion and no other. Otherwise, even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices. Similarly even practices though religious may have sprung merely from superstitious beliefs and may in that sense be extraneous and unessential accretions to the religion itself. (GAJENDRAGADKAR J.)

Durgah Committee, Ajmer v. *Syed Hussain Ali*, 1961 SC 1402.

Art. 26 (b)—matters of religion.

Questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which clause (b) applies. (MUKHERJEA J.)

Commissioner, Hindu Religious Endowments Madras v. *Lakshmindra Thirtha Swamiar*, 1954 SCR 1005.

Art. 26 (b) and (d)—distinction.

While the right of a religious denomination so far as administration of its property is concerned, is to be exercised "in accordance with law" there is no such qualification in Cl. (b) and the right of the religious denomination to manage its own affairs in matters of religion is a fundamental right which no legislature can take away. (S. K. DAS J.)

Sarup Singh v. *State of Punjab*, 1959 SC 860 : 1959 SCJ 1115 : 1960 (1) SCA 163.

Art. 26 (d)—Applicability.

If the denomination never had the right to manage the properties endowed in favour of a denominational institution, as for instance, by reason of the terms on which the endowment was created, or has been validly surrendered by it or has otherwise been effectively and irretrievably lost to it, Art. 26 cannot successfully be invoked by the denomination. (GAJENDRAGADKAR J.)

Durgah Committee, Ajmer v. *Syed Hussain Ali*, 1961 SC 1402.

Committee confined to denomination.

The infirmity or vice in a statute which constitutes by nomination a committee for the management and administration of the property of a denomination and which therefore is attacked as infringing the Article, cannot be cured by confining the members of the proposed committee to the denomination itself.

1959 Raj 177 Criticised. (GAJENDRAGADKAR J.)

(*ibid*).

Law taking away right of management.

A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to violation of the fundamental right guaranteed under Art. 26 (d).
(MUKHERJEA J.)

Commissioner, Hindu Religious Endowments, Madras v. *Lakshmindra Thirtha Swamiar*, 1954 SC 282 : 1954 SCR 1005 : 1954 SCJ 335 : 1954 SCA 415 : 1954 (1) MLJ 596 : 67 LW 1220 : 1954 MWN 363 : 20 CLT 250.

In regard to affairs in matters of religion the right of management given to a religious body is a guaranteed fundamental right which no legislation can take away. On the other hand, as regards administration of property which a religious denomination is entitled to own and acquire, it has undoubtedly the right to administer such property but only in accordance with law. This means the State can regulate the administration of trust properties by means of laws validly enacted ; but here again it should be remembered that under Art. 26 (d) it is the religious denomination itself which has been given the right to administer its property in accordance with law validly enacted. Hence a law which takes away the right of administration altogether from the religious denomination and vests it in any other or secular authority will amount to violation of the right guaranteed by Art. 26 (d). (MUKHERJEA J.)

Ratilal Panachand Gandhi v. *State of Bombay*, 1954 SC 388 : 1954 SCR 1055 : 1954 SCJ 480 : 1954 SCA 538 : 56 Bom LR 1184 : 1954 (1) MLJ 718.

Art. 27—Distinction between tax and fee.

The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden while a fee is a payment for a special benefit or privilege. (MUKHERJEA J.)

Commissioner H. R. E. Madras v. *Laksmindra Thirtha Swamiar*, 1954 SC 282 : 1954 SCR 1005 : 1954 SCJ 335 : 1954 SCA 415 : 1954 (1) MLJ 596 : 67 LW 1220 : 1954 MWN 363 : 20 CLT 250 : 1954 VLJ SC 1.

Art. 29(2)—Communal G. O.

The Communal G. O. of the Madras Government laying down rules fixing proportions in which candidates from various communities may be selected for admission to professional Colleges constitutes a clear violation of the fundamental right of a citizen under Art. 29 (2) and is void. (S. R. DAS J.)

State of Madras v. *Champakam Dorairajan*, 1951 SCR 525 : 1951 SC 226 : 1951 SCJ 313 : 1951 (1) MLJ 621 : 6 DLR (SC) 239 : 1951 ALJ 107 : BLR 1951 SC 188 : 64 LW 430 : 1951 MWN 470 : 1951 Ker LT 41 : 1951 RLW 333.

Article 31.

[Art. 31 is a self-contained provision delimiting the field of *eminent domain* and clauses (1) and (2) deal with the same topic of compulsory acquisition of property.

Observation of DAS J. in 1950 SCR 869 Not Approved. (MAHAJAN J.)

Dwarakadas Shrinivas v. *Sholapur Spinning and Weaving Co.*, 1954 SC 119 : 1954 SCR 674 : 1954 SCJ 115 : 1954 SCA 132 : 9 DLR SC 187 : 56 Bom LR 681 : 1954 (1) MLJ 355 : 67 LW 176.

Clauses whether mutually exclusive.

Art. 31 (1) is designed to protect the rights to property against deprivation by the State acting through its executive organ, the Government. Cl. (2) imposes two further limitations on the Legislature itself. These important limitations on the power of the State acting through its executive and Legislative organs, to take away private property are designed to protect the owner against arbitrary deprivation of his property.

Clauses (1) and (2) are thus not mutually exclusive in scope and content but should be read together and understood as dealing with the same subject, namely, the prosecution of the right to property by means of the limitation on the State's power referred to above, the deprivation contemplated in Cl. (1) being no other than the acquisition or taking possession of property referred to in Cl. (2).

View of S. R. DAS J. in 1950 SCR 869 Not Approved. (PATANJALI SASTRI C. J.)

State of West Bengal v. *Subodh Gopal*, 1954 SC 92 : 1954 SCR 587 : 1954 SCJ 127 : 1954 SCA 65 : 9 DLR SC 127 : 67 LW 206.]

Note :—These two are cases before the Constitution (Fourth Amendment) Act, 1955.

Art. 31 (1)—whether applies to illegal imposition of tax.

Art. 31(1) must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of taxes, for otherwise Art. 265 will be wholly redundant. (S. R. DAS J.)

Ramjilal v. *Incometax Officer*, 1951 SCR 127 : 1951 SC 97 : 1951 SCJ 203 : 1952 SCA 107 : BLR 1951 SC 96 : 6 DLR SC 93 : 1951 ALJ 16 : 1951 ITR 174 : 64 LW 402 : 1951 (1) MLJ 384.

Art. 31 which protects citizens and non-citizens alike deals with deprivation of property otherwise than by way of levying or collecting taxes.

1951 SCR 127 Followed. (S. R. DAS AG. C. J.)

Bengal Immunity Co. Ltd. v. *State of Bihar*, 1955 (2) SCR 603 : 1955 SC 661 : 1955 SCA 1140 : 1955 SCJ 672 : 34 Pat 905 : 1955 (2) MLJ 168 : 1955 (6) STC 446.

"Deprived" of his "property".

The word property in the context of Art. 31 must be understood both in a corporeal sense as having reference to all those specific things that are susceptible of private appropriation and enjoyment as well as in its juridical or legal sense of a bundle of rights which the owner can exercise under the municipal law with respect to the user and enjoyment of those things to the exclusion of all others. This wide connotation of the term makes it sometimes difficult to determine whether an impugned law is a "deprivation", for any restriction imposed can be regarded as a deprivation of one or more of the rights theretofore exercised by the owner. Broadly speaking, it may be said that an abridgement would be so substantial as to amount to deprivation within the meaning of Art. 31 if, in effect, it withheld the property from the possession and enjoyment of the owner or seriously impaired its use and enjoyment by him or materially reduced its value.

(PATANJALI SASTRI C. J.)

State of West Bengal v. *Subodh Gopal*, 1954 SC 92 : 1954 SCR 587 : 1954 SCJ 127 : 1954 SCA 65 : 9 DLR SC 127 : 67 LW 206.

Deprivation—what amounts to.

Whether the facts in a given case amount to deprivation of property within the meaning of Art. 31 will depend upon the circumstances of each case and it is not possible to lay down any inflexible test which will be universally applicable. If the Statute substantially interferes with the right of enjoyment of property it will be hit by Art. 31 (2). (GHULAM HASAN J.)

Dwarakadas Shrinivas v. *Sholapur Spinning and Weaving Co.*, 1954 SC 119 : 1954 SCR 674 : 1954 SCJ 115 : 1954 SCA 132 : 9 DLR SC 187 : 56 Bom LR 681 : 1954 (1) MLJ 355 : 67 LW 176.

Law regulating relation of landlord with his tenant.

It is well settled that a law which regulates the relation of landlord with his tenant is not one which takes away property within the meaning of Art. 31 (2), even though it has the effect of reducing his rights.

73 Ind. App. 123 Followed. (VENKATARAMA IYER J.)

Kishan Singh v. *State of Rajasthan*, 1955 (2) SCR 531 : 1956 SCA 402 : 1956 SCJ 14 : 1956 SC 795.

Property—whether includes rights under a contract.

An ex-proprietor of an estate had granted to the petitioner a license to catch and carry away fish in a lake in the estate. After the vesting of the estate in them under the Orissa Estates Abolition Act, 1951, the Government refused to recognise the licences from the date of vesting. On an application by the licensee under Art. 32 to the Supreme Court, *held*,

Assuming, without deciding, that a contract such as the licences in question is "property", no question of infringement of Art. 19 (1) (f) or 31 (1) could arise for the State had not confiscated or acquired or taken possession of the contract as such and therefore the petition should fail. (BOSE J.)

Anand Behara v. *State of Orissa*, 1955 (2) SCR 919 : 1956 SC 17 : 1955 SCJ 96 : 1956 SCC 70 : 22 Cut LT 101 : 1956 (1) MLJ 69 : (1956) Cut 425 : 69 LW 972.

Contract with Government.

Art. 31 cannot be invoked to prevent the cancellation by the Government of a contract held by a person with it in exercise of powers conferred by one of the terms of the contract itself. (HIDAYATULLAH J.)

C. K. Achuthan v. *State of Kerala*, 1960 (1) SCA 33.

"Acquired or taken possession."

There is no sufficient reason to construe the words "acquired or taken possession of" used in Cl. (2) in a narrow technical sense. The word "acquisition" and its grammatical variations should in the context of Art. 31 and entries 33, 36 and 42 of Lists I, II and III respectively of the Seventh Schedule, be understood in their ordinary sense and the additional words "taking possession of" and "requisitioning" are used in Article 31(2) and the entries respectively, not in contra-distinction with but in amplification of the term "acquisition" so as to make it

clear that the words taken together cover even those kinds of deprivation which do not involve the continued existence of the property after it is acquired.
(PATANJALI SASTRI C. J.)

State of West Bengal v. *Subodh Gopal*, 1954 SC 92 : 1954 SCR 587 : 1954 SCJ 127 : 1954 SCA 65 : 9 DLR SC 127 : 67 LW 206.

Public purpose—what is.

See *State of Bihar* v. *Sir Kameshwar Singh*, 1952 SC 252 : 1952 SCR 1020 : 65 LW 527 : 31 Pat 565.

Compensation must be just equivalent.

While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount of compensation to be given, such principles must ensure that such compensation is a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification, the Constitution allows free play to the legislative judgment as to what these principles should be. Whether such principles take into account all the elements which make up the value of the property and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the court. (PATANJALI SASTRI C. J.)

State of West Bengal v. *Mrs. Bella Bannerjee*, 1954 SC 170 : 1954 SCR 558 : 1954 SCA 41 : 1954 SCJ 95 : 1954 (1) MLJ 162 : 93 CLJ 264.

[NOTE :—Case before the Constitution (Fourth Amendment) Act 1955.]

Arts. 31 (2) and 31A—Enactment for requisition without public purpose.

After the Constitution (Seventh Amendment) Act, 1956 a State Legislature may enact a law of acquisition even without a public purpose and the only obstacle to such an enactment is the provisions of Art. 31 (2) which also disappears if the law in question is one within Art. 31A. (DAS GUPTA J.)

State of Bihar v. *Rameshwar Pratap Narain Singh*, 1961 SC 1649.

Art. 31 (3)—non-compliance—in the passing of Bombay Acts 2 of 1950 and 39 of 1950—effect on Bombay Land Requisition Act, 1948.

The Bombay Land Requisition Act, 1948 was valid even after the passing of the Constitution, as held in 1955 (1) SCR 777 even though it was not expressly provided therein that the acquisition or requisition was to be for a public purpose provided that from the whole tenor and intendment of the Act it could be gathered that the requisition was to be for a public purpose. Act XXXIX of 50 only made explicit what was not so in the original Act, and Act II of 1950 only extended the original Act for two years more. These two Acts are not such laws as fall within Art. 31 (3). Hence the fact that the assent of the President was not obtained for these two Acts does not affect their validity or the validity of the original Act.
(SINHA J.)

Lilavati Bai v. *State of Bombay*, 1957 SC 521 : 1957 SCA 465 : 59 Bom LR 934 : 1957 SCJ 557.

Art. 31(4)—"passed by such Legislature".

The expression "passed by such Legislature" must mean "passed with or without amendments" in accordance with normal procedure. Hence the conten-

tion that to attract the provisions of Cl. (4) the Bill has got to be passed in its original shape without any change whatsoever cannot be accepted.

(MUKHERJEA J.)

Gajpati Narayan Deo v. *State of Orissa*, 1954 SCR 1 : 1953 SC 375 : 1954 SCA 1 : 1953 SCJ 592 : (1954) Orissa 351 : 20 CLT 1.

Public purpose.

The existence of a public purpose is not a justiciable issue in the case of an enactment which having fulfilled the requirements of Art. 31 (4) enjoys the protection afforded by it.

1954 SCR 1 Ref. to. (MUKHERJEA J.)

Zamindar of Ettayapuram v. *State of Madras*, 1954 SC 257 : 1954 SCR 761 : 1954 SCJ 282 : 1954 SCA 317 : 1954 (1) MLJ 486.

Arts. 31(4) and 31A.

The scope of Article 31(4) is at once narrower and wider than Article 31A. The former applies only to statutes which were pending in the legislature at the commencement of the Constitution whereas the latter is subject to no such restriction. Again Article 31(4) excludes attack only on the ground of contravention of Article 31(2) while Article 31A bars objections based on contravention of other provisions of Part III as well, such as Articles 14 and 19.

On the other hand the law referred to in Article 31(4) covers acquisition of any kind of property while Article 31A relates only to property of a particular kind, *viz.*, estates and rights therein.

Also the *non obstante* clause in Article 31(4) overrides all other provisions in the Constitution including the lists of the Seventh Schedule while Article 31A can only prevail over "the foregoing provisions of this Part."

(PATANJALI SASTRI C. J.)

State of Bihar v. *Sir Kameshwar Singh*, 1952 SCR 1020 : 1952 SC 252 : 65 LW 527 : 31 Pat 565.

Art. 31(5) (b) (iii)—Scope.

The contention that the protection afforded by clause (5) (b) (iii) must be limited to a law which itself declares any property to be evacuee property and not to a law which empowers an authority so to declare, cannot be accepted. The protection afforded by the provision is not so restricted but extends to a law which provides for the determination of the criteria for declaring property to be evacuee property. (MUDHOLKAR J.)

Bawa Harigir v. *Assistant Custodian Evacuee Property, Bhopal*, 1961 SC 125.

Art. 31 (6)—applicability.

Reading clauses (5) and (6) together the intention is clear that an existing law passed within 18 months before 26-1-'50 is not to be saved unless it was submitted to the President within 3 months from such date for his certification and was certified by him. (PATANJALI SASTRI C. J.)

State of West Bengal v. *Mrs. Bella Bannerjee*, 1954 SC 170 : 1954 SCR 558 : 1954 SCA 41 : 1954 SCJ 95 : 1954 (1) MLJ 162 : 93 CLJ 264.

Art. 31-A—Scope.

Art. 31A deprives citizens of their fundamental rights and therefore cannot be extended by interpretation to overreach the object implicit in the Article and modify rights of owners of land without reference to the law of land tenures.
(SUBBA RAO J.)

Kochunni v. *States of Madras and Kerala*, 1960 SC 1080 : 1960 Ker LT (SC) 31 : 1960 Ker LJ 1077.

While Art. 31(4) protects an Act falling within it only against the contravention of the provisions of clause (2) of that Article, Art. 31-A protects an Act falling within it even if it is inconsistent with or abridges any of the fundamental rights and therefore obviously gives wider protection than does Art. 31(4).
(S. R. DAS C. J.)

Bhairebendra Narayanan Bhup v. *State of Orissa*, 1956 SCR 303 : 1956 SC 503 : 1956 SCJ 543 : 1956 SCA 736.

"Estates" and "rights".

As the connotation of the term "estate" was different in different parts of the country, the expression "estate" described in clause (2) has been so broadly defined as to cover all estates in the country and to cover all possible kinds of rights in estates as shown by sub-clause (b).

Keeping in view the fact that Art. 31A was enacted by two successive amendments with retrospective effect in order to save legislation effecting agrarian reforms from attack on the ground of constitutional invalidity based on Articles 14, 19, and 31, there is every reason to hold that the expressions "estates" and "rights" have been used in widest amplitude consistent with the purpose behind those amendments. Such a piece of validating enactment purposely introduced should not be construed in a narrow sense, but should be given its fullest and widest effect, provided however that such a construction does not involve any violence to the language actually used. (B. P. SINHA J.)

Atma Ram v. *State of Punjab*, 1959 SC 519 : 1959 SCJ 407.

'Inams'—Bombay Personal Inams Abolition Act (42 of 1953).

Inams are estates within the meaning of the expression 'estate' for the purpose of Art. 31A. The right of the inamdar to retain part of the full assessment over and above the quit-rent payable to the Government arises because he holds the inam-estate. The right can be no more than a right in an estate.

The Bombay Personal Inams Abolition Act, when it extinguishes or modifies the rights of inamdars in the inam-estates is protected by Art. 31A.

1955 Bom 28 Affirmed. (WANCHOO J.)

Gangadharrao v. *State of Bombay*, 1961 SC 288.

"Modification".

The word "modification" only means a modification of the proprietory right of a citizen like an extinguishment of that right and cannot include within its ambit a mere suspension of the right of management of estate for a time, definite or indefinite. (MAHAJAN J.)

Raghubir Singh v. *Court of Wards, Ajmer*, 1953 SC 373 : 1953 SCR 1049 : 1956 SCJ 543 : 1953 SCA 629 : 8 DLR SC 490 : 1954 MWN 433.

"Jagirs"—in favour of members of the ruling family.

At the time of the enactment of the Article, the word 'Jagir' had acquired both in popular usage and legislative practice a wide connotation and it will be in accordance with sound canons of interpretation to ascribe that connotation to that word rather than an archaic meaning to be gathered from a study of ancient tenures.

Moreover, the object of Art. 31-A was to save legislation which was directed to the abolition of intermediaries so as to establish direct relationship between the State and the tillers of the soil, and construing the word in that sense which would achieve that object in a full measure it must be held that Jagir was meant to cover all grants under which the grantees had only rights in respect of revenue and were not the tillers of the soil. Maintenance grants in favour of persons who were not cultivators such as members of the ruling family would be Jagirs for purposes of Art. 31-A.

Amar Singhji v. *State of Rajasthan*, 1955(2) SCR 164 : 1955 SC 504 : 1955 SCJ 523 : 1955 SCA 766.

***Bhomichara* tenure in Marwar.**

By long usage and recognition and legislative practice of the State, *Bhomicharas* of Marwar State have come to be regarded as Jagirdars and hence the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952 in so far as it relates to Bhomichara tenure is protected by Art. 31-A.

Similarly the Act in so far as it relates to Bhomats of Mewar, Tikanadars of Shekhwati and Subeguzars of Jaipur, is protected by Art. 31-A.

(VENKATARAMA IYER J.)

Amar Singhji v. *State of Rajasthan*, (*ibid.*)

"Jagir or other similar grant."

Istimrar will be "other similar grant" within the meaning of Art. 31-A.

(VENKATARAMA IYER J.)

Amar Singhji v. *State of Rajasthan*, (*ibid.*)

Art. 31-B.

The protection (under Art. 31-B) is not merely against the contravention of certain provisions but an attack on the ground of unconstitutional abridgement of 'certain rights'. It will be illogical to construe Art. 31-B as affording protection only so far as these rights are taken away by an Act in violation of the provisions of the Constitution but not when they are taken away by an Act in violation of S. 299 of the Government of India Act which has been repealed. Since the Bombay Taluqdari Tenure Abolition Act 1949 is one of the Acts specified in the Ninth Schedule, the provisions of the Act are immune from attack of the kind put forward.

1952 SCR 889 Distinguished. (JAGANNADHA DAS J.)

Dhirubha Devi Singh v. *State of Bombay*, 1955 SCR 691 : 1955 SC 47 : 1955 SCJ 1 : 57 Bom. LR 718.

Art. 32—provides a "guaranteed" remedy.

Art. 32 provides a "guaranteed" remedy for the enforcement of the fundamental rights and this remedial right itself is made a fundamental right by being included in Part III. The Supreme Court is thus constituted the protector or

guarantor of fundamental rights and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights on the ground that the aggrieved party should first resort to the High Court which under Art. 226 has concurrent jurisdiction in the matter. (PATANJALI SASTRI J.)

Romesh Thappar v. *State of Madras*, 1950 SC 124 : 1950 SCR 594 : 1950 SCJ 418 : 1950 (2) MLJ 390 : 1950 ALJ 485 : 63 LW 929 : 1950 MWN 435.

When can be invoked.

An enactment may immediately on its coming into force take away or abridge a fundamental right of a person by its very terms and without any overt act being done. In such a case the infringement is complete *eo instanti* the passing of the Act and a person so prejudicially affected will be immediately entitled to avail himself of the remedy under Art. 32. (S. R. DAS C. J.)

Kochunni v. *State of Madras*, 1959 SC 725 : 1959 SCJ 858 : 1959 (2) SCA 248 : 1959 Ker LJ 464 : 1959 (2) MLJ 70.

Scope of the remedy.

The wording of the Article shows that the Supreme Court can be moved to grant a suitable relief, mentioned in clause (2) only in respect of the fundamental rights mentioned in Part III of the Constitution. (KANIA C. J.)

A. K. Gopalan v. *State of Madras*, 1950 SCR 88 : 1950 SCJ 174 : 1950 SC 27 : 1950 MWN 495 : 1950 (2) MLJ 42 : 63 LW 638 : 51 Cr LJ 1383.

The writs to which reference has been made must obviously be correlated to one or more of the fundamental rights conferred by Part III and can be made only for the enforcement of such rights. (FAZL ALI J.)

Janardhan Reddy v. *State of Hyderabad*, 1951 SCR 344 : 1951 SC 217 : 1951 SCJ 320 : 6 DLR (SC) 262 : BLR 1951 SC 215 : 1951 ALJ 94 : 64 LW 406 : 1951 MWN 613.

Illegal imposition of tax on trade.

If a tax is levied without due legal authority on any trade or business, it is open to the aggrieved citizen to approach the Supreme Court for a writ, since his right under Art. 19(1) (g) to carry on a trade is violated by the imposition. (GOVINDA MENON J.)

Kailash Nath v. *State of Uttar of Pradesh*, 1957 SC 790 : (1957) 8 STC 358.

Invalidity of impugned Act not sufficient.

The Article is not directly concerned with the determination of the constitutional validity of particular legislative enactments. What it aims at is the enforcing of fundamental rights guaranteed, no matter whether the necessity for such enforcement arises out of an action of the executive or of the Legislature. To make out a case under this Article it is incumbent upon the petitioner to establish not merely that the law complained of is beyond the competence of the particular legislature as not being covered by any of the items in the legislative lists, but that it affects or invades his fundamental rights of which he can seek enforcement by an appropriate writ or order. (MUKHERJEA J.)

Charanjitlal v. *Union of India*, 1950 SCR 869 : 1951 SC 41 : 1951 SCJ 29 : 6 DLR (SC) 432 : BLR 1951 SC 40 : 1951 MWN 111 : 64 LW 47 : 1951 Comp. Cas. 33 : 1951 CWN 235.

Remedy is narrower than remedy under Article 226.

The scope of the remedy under Art. 32 is clearly narrower than that under Art. 226 through the High Courts, in that it is restricted solely to enforcement of fundamental rights conferred by the Constitution.

Any right, for instance, a person may have as a rate-payer in a local authority to insist that it should be legally constituted and that persons who are alleged not to have been properly elected or nominated should not be permitted to take part in its proceedings, is outside the purview of Art. 32 as such a right, even if it exists, is not a fundamental right. (PATANJALI SASTRI C. J.)

Nain Sukh Das v. *State of U.P.*, 1953 SC 384 : 1953 SCR 1184 : 1953 SCJ 546 : 1953 SCA 594 : 8 DLR SC 413 : 1953 (2) MLJ 257.

Right under Article 265.

Inasmuch as the right conferred by Art. 265 is not a right conferred by Part III of the Constitution, it cannot be enforced under Art. 32.

1951 SCR 127 Relied on. (MAHAJAN C. J.)

Laxmanappa v. *Union of India*, 1955 SCR 769 : 1955 SC 3 : 1955 SCJ 590 : 1955 (2) MLJ 94 : 26 ITR 754 : 1954 SCA 1313.

Right under Article 301.

The guarantee of freedom of inter-State and intra-State trade or business embodied in Art. 301 is not a fundamental right which can be enforced by a petition under Art. 32. (BHAGWATI J.)

Ram Chandra Palai v. *State of Orissa*, 1956 SCR 28 : 1956 SC 298 : 1956 SCA 346 : 22 Cut. LT 171 : 1956 SCJ 293 : 1956 SCC 184.

Decision of competent tribunal.

The alleged right of a person to guardianship of his minor children under his personal law is not a fundamental right nor is appointment of another person as guardian discrimination against the minors. The equality before the law, or the equal protection of laws can be claimed against executive action or legislative process but not against the decision of a competent tribunal the remedy against which is the approaching of a superior tribunal, if there be one. When an appeal from a such a decision to the High Court is dismissed and leave under Art. 136 is also refused the matter cannot be agitated by a petition under Art. 32. (SHAH J.)

Amirabhas Abbasi v. *State of Madhya Bharat*, 1960 SCJ 713 : 1960 (3) SCR 138 : 1960 SC 768 : 1960 BLJR 492 : 1960 ALJ 617 : 1960 MPC 424 : 1960 (2) MLJ 25 : 1960 (2) An WR 25 : 1960 A11 WR 478.

Erroneous administrative order—remedy.

If the decision of an administrative authority acting under a special law, is erroneous on facts or merits, the proper remedy is by way of an appeal. Unless the statutory provision relating to the matter is challenged as unconstitutional or the order as being in excess of the power given to that authority and therefore without jurisdiction, no question of any fundamental right under Art. 19 (1) (f) and (g) can arise giving rise to a petition under Art. 32. (S. K. DAS J.)

Gulabdas and Co. v. *Assistant Collector of Customs*, 1957 SC 733 : 1958 SCA 164 : 1957 SCJ 709.

Declaratory relief—power of Supreme Court.

The powers of the Supreme Court under Art. 32 are wide enough to make even a declaratory order when that is the proper relief to be given to the aggrieved party. (S. R. DAS C. J.)

Kochunni v. *State of Madras*, 1959 SC 725 : 1959 SCJ 858 : 1959 (2) SCA 248 : 1959 Ker LJ 464 : 1959 (2) MLJ 70.

Procedure—facts to be considered.

It is only on facts admitted or taken as proved that the question of violation of fundamental rights can be decided by the Supreme Court under Art. 32, because when facts are in dispute the matter has to be enquired into and decided by proper legal proceedings. (GOVINDA MENON J.)

Kailash Nath v. *State of Uttar Pradesh*, 1957 SC 790 : (1957) 8 STC 358.

Enquiry into disputed facts.

In an application under Art. 32, the Supreme Court cannot embark on an investigation into disputed questions and materials. (S. K. DAS J.)

Gulabadas and Co. v. *Assistant Collector of Customs*, 1957 SC 733 : 1958 SCA 164 : 1957 SCJ 709.

Can be dealt with on affidavits.

The proposition that on an application under Art. 32 the Supreme Court may decline to entertain the same on the simple ground that it involves determination of disputed questions of fact cannot be accepted. For questions of fact can be and very often are dealt with on affidavits. (S. R. DAS C. J.)

Kochunni v. *State of Madras*, 1959 SC 725 : 1959 SCJ 858 : 1959 (2) SCA 248 : 1959 Ker LJ 464 : 1959 (2) MLJ 70.

Enquiry into rival claims to title.

The Court exercising prerogative of issuing writs will not enquire into rival claims of title to property in dispute, for that would be entering into a field of investigation more appropriate for a Civil Court in a properly constituted suit. (IMAM J.)

Sohan Lal v. *Union of India*, 1957 SC 529 : 1957 SCJ 489 : 1957 SCA 417 : 1957 MPC 466 : 1957 BLJR 566 : 1957 (2) MLJ 50 : 1957 (2) An WR 50 : 1957 All WR 598 : 1957 All LJ 682 : (1957) Punj 1542.

Recitals in preamble.

In an application under Art. 32 impugning the validity of a legislation on the ground of infringement of Art. 14, the correctness of the recitals in the preamble of the Act (showing the necessity for the legislation) cannot be disputed.

256 U.S. 135 Relied on. (VENKATARAMA IYER J.)

Indersingh v. *State of Rajasthan*, 1957 SCR 605 : 1957 SC 510 : 1957 SCA 735 : 1957 SCJ 376.

Existence of adequate alternative remedy.

Though the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs, the powers given to the Supreme Court are much wider and are not confined to issuing prerogative writs only. (S. R. DAS J.)

Rashid Ahmed v. *Municipal Board, Kairana*, 1950 SC 163 : 1950 SCR 566 : 1950 SCJ 124 : 63 LW 867.

Whether *per se* sufficient ground for refusal of writ.

The mere existence of an adequate alternative remedy cannot *per se* be a good and sufficient ground for throwing out a petition under Art. 32, if the existence of a fundamental right and a breach, actual or threatened, of it is alleged and *prima facie* established on the petition. (S. R. DAS C. J.)

Kochunni v. *State of Madras*, 1959 SC 725 : 1959 SCJ 858 : 1959 (2) SCA 248 : 1959 Ker LJ 464 : 1959 (2) MLJ 70.

Dismissal of application under Art. 226—effect.

Whether the Supreme Court can grant relief on an application under Art. 32 preferred during the pendency of an application for certificate to appeal to the Supreme Court in the High Court, which dismissed the applicant's petition under Art. 226.

See *Shrinivasa Reddy* v. *State of Mysore*, 1960 SC 350 : 1960 (2) SCR 130 : 1960 SCJ 1092.

Res Judicata—effect of dismissal by High Court of application under Art. 226.

The basis on which the rule of Res Judicata rests is founded on considerations of public policy. The binding character of judgments pronounced by Courts of competent jurisdiction is itself an essential part of the rule of law which obviously is the basis of the administration of justice on which the Constitution lays so much emphasis. Hence the argument that Res Judicata is a technical rule and as such is irrelevant in dealing with petitions under Art. 32 cannot be accepted.

Case-law discussed.

(The Court laid down the following principles :—)

(1) If a writ petition filed by a party under Art. 226 of the Constitution is considered on merits as a contested matter and is dismissed by the High Court the decision thus pronounced will continue to bind the parties unless it is otherwise modified or revised by appeal or other appropriate proceedings permissible under the Constitution and it will not be open to a party to ignore the said judgment and move the Supreme Court under Art. 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs.

(2) If the petition under Art. 226 is dismissed not on merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to him, then such dismissal will not constitute as a bar to a subsequent petition under Art. 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32.

(3) If an order is pronounced by the High Court dismissing a writ petition *in limine*, whether or not the dismissal would constitute a bar will depend upon the nature of the order. If the order is on merits, it will be a bar ; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy, it will not be a bar, except in the cases indicated above.

(4) If the petition under Art. 226 is dismissed *in limine* without a speaking order, then such dismissal cannot be treated as creating a bar of Res Judicata.

(5) If the petition under Art. 226 is dismissed as withdrawn it cannot be a bar to a subsequent petition under Art. 32 because there has been no decision on merits by the Court.

(6) Also a change in the form of attack against the statute which is impugned will make no difference to the true legal position where the two writ petitions are directed against the same statute and the grounds raised in that behalf are substantially the same. (GAJENDRAGADKAR J.)

Daryao v. *State of U.P.*, 1961 SC 1457.

Voluntary act of a person.

Art. 32 is not intended for relief against the voluntary actions of a person. Where the tax was being recovered on the basis of a settlement proposed by the assessee and accepted by the Government, he cannot complain that any of his fundamental rights has been contravened for which he can claim relief under Art. 32 unless he can establish that his consent was improperly procured. His remedy lies in other appropriate proceedings.

Gopal Das v. *Union of India*, 1955 SC 1.

Considerations for issue of writ.

The right of any person to seek remedy under Art. 32 in respect of any violation of his fundamental rights is in no way curtailed or affected by the fact that an actual decision on an application under Art. 32 is, in effect, nullified by appropriate and competent legislative measures. (JAGANNADHADAS J.)

Sadashib Prakash v. *State of Orissa*, 1956 SCR 43 : 1956 SC 432 : 1956 SCA 794 : 1956 SCJ 397 : 22 Cut LT 235 : 1956 SCC 478.

Laches—whether can be considered.

Ordinarily if a petitioner makes out a case for the issue of an appropriate writ or order, he will be entitled to have it under Art. 32. But if the petition is filed after a long lapse of time considerations may arise whether rights accruing in the meanwhile in favour of third parties can be allowed to be affected and, in such a case, laches or acquiescence on the part of the petitioner may have to be considered. (GAJENDRAGADKAR J.)

Daryao v. *State of Uttar Pradesh*, 1961 SC 1457.

Appropriate proceedings.

The argument that the Article does not confer upon a citizen a right to move the Supreme Court by an original petition but merely gives him the right to move the Supreme Court by appropriate proceeding according to the nature of the case is unsound. The appropriateness of the proceeding would depend upon the particular writ or order which he claims and it is in that sense that a right is guaranteed to move the Supreme Court by appropriate proceedings. (GAJENDRAGADKAR J.)

(*ibid*).

Illustrative cases.

On land belonging to the State, with its permission one R built a Dharmashala and was managing the same. By executive orders the Government forcefully

dispossessed R who filed an application to the Supreme Court under Art. 32. It was contended on behalf of the State that there was a serious dispute between the parties on questions of fact, i.e., whether the sanction granted to R was a lease in his favour or whether it was a licence coupled with a grant or an irrevocable licence and whether R had any right or title to the property in dispute, and that therefore proceedings by way of a writ were inappropriate.

Held, the petitioner had made out a clear case of a violation of his fundamental right for which a writ would issue. *Held* further, that the maxim, what is annexed to the soil goes with the soil, has not been accepted as an absolute rule of law of this country, a person who bonafide puts up constructions on land belonging to others with their permission would not be a trespasser nor would the buildings so constructed vest in the owner of the land by the application of the maxim *quicquid planta solo, solo cedit*, that if the State thought that the constructions should be removed or the condition on which the sanction was granted as to resumption of the land should be invoked it was open to it to take appropriate legal action for the purpose and that even if the State proceeded on the footing that the trust was a public trust, the trustee could be removed only by procedure known to law and not by an executive fiat.

Held finally that R was bonafide in possession of the constructions in question and could not be removed except under authority of law and that the State could be restrained by a writ from interfering with R in the management of the Dharmashala. (S. K. DAS J.)

Bishan Das v. *State of Punjab*, 1961 SC 1570.

Threat to collect sales-tax again on the same sales.

A company having paid the tax to the State Government for and on behalf of the Central Government, a threat to recover again sales-tax on behalf of the Central Government in respect of the same sales, i.e., sales which were included in the assessment proceedings before the State Sales-Tax authorities, *prima facie*, infringes the fundamental right of the company to hold its property and the company is entitled to approach the Supreme Court under Art. 32.

Tata Iron & Steel Co. Ltd. v. *S. R. Sarkar*, 1961 SC 65.

Art. 32(2A)—applies only for enforcement of fundamental rights.

The High Court of Jammu and Kashmir can exercise its powers under Art. 32(2A) only for the enforcement of a fundamental right.

Where a public servant contended that he was entitled to have the procedure prescribed by the Kashmir Civil Service Rules followed before the order demoting him could be made and that as that procedure was not followed he had been denied equal protection of the laws but it was not his case that other public servants had been given the benefit of those rules and such benefit was designedly denied only to him,

Held, the High Court had no power to act under Art. 32(2A) ; for all that could be said to have happened in the case was that the State had acted in breach of the law (assuming the Rules were law) but that did not amount to a violation of the right to equal protection of laws since otherwise every breach by the Government of a law would amount to a denial of the equal protection of the laws for which proposition there is no support in principle or authority.

1956 J & K 17 Reversed. (SARKAR J.)

State of Jammu & Kashmir v. *Ghulam Rasool*, 1961 SC 1301.

PART IV—Directive Principles of State Policy.

The directive principles of State policy cannot override the provisions of Part III conferring fundamental rights. (S. R. DAS J.)

State of Madras v. *Champakam Durairajan*, 1951 SC 226 : 64 LW 430 : 1951 SCJ 313 : 6 DLR (SC) 239 : 1951 (1) MLJ 621 : 1951 MWN 470 : 1951 KLT 41 : 1951 ALJ 107 : 1951 RLW 333 : BLR 1951 SC 188 : 1951 SCR 525.

How to be implemented.

The directive principles cannot override the categorical restriction imposed by Art. 13 on the legislative power of the State. The Constitution, harmoniously construed, means that the State should certainly implement the directive principles but in such a way that its laws do not take away or abridge the fundamental rights. (S. R. DAS C. J.)

Mohd. Hanif Quareshi v. *State of Bihar*, 1958 SC 731 : 1958 SCJ 975 : 1958 SCA 783.

Art. 71—Jurisdiction of Supreme Court—when arises.

The word election in Art. 71 means the entire election process culminating in a candidate being declared elected and doubts and disputes arising out of or in connection with any of the stages of such completed election have to be inquired into and decided by the Supreme Court which in point of time, must necessarily be after the completion of the entire process. (S. R. DAS C. J.)

Dr. N. B. Khare v. *Election Commission of India*, 1957 SC 694.

Procedure.

The right of a person to file an application to set aside an election of the President or Vice-President must be determined by Act XXXI of 1952 passed under Art. 71 (3) and unless a person brings himself within the four corners of that statute and conforms to the Rules made by the Supreme Court in this regard, the petition must fail. (VENKATARAMA IYER J.)

Dr. N. B. Khare v. *Election Commission, India*, 1958 SC 139.

Arts. 73 & 162—Executive Function—Scope.

Neither of these articles contains any definition as to what the executive function is and what activities would legitimately come within its scope. They are concerned primarily with the distribution of the executive power between the Union and the States. The language of the Articles clearly indicates that the powers of the executive do extend to matters upon which the legislature is competent to legislate and are not confined to matters over which legislation has been passed already.

It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.

The Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that the Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.

It can also, when so empowered, exercise judicial functions in a limited way. But the Government can never go against the provisions of the Constitution or of any law.

Ram Jawaya Kapur v. *State of Punjab*, 1955 (2) SCR 225 : 1955 SC 549 : 1955 SCJ 504 : 1955 (2) MLJ 59 : 57 Pun. LR 444 : 1955 MWN 973 : 1955 SCA 577.

Trade or business.

For the purpose of carrying on a business the Government does not require any additional powers and whatever is necessary for their purpose, they can have by entering into contracts with others.

The carrying on of the business of printing and publishing text books is not beyond the competence of the executive Government without a specific legislation sanctioning such course. (MUKHERJEA C. J.)

Ram Jawaya Kapur v. *State of Punjab*, (*ibid*).

Art. 102(1)(a)—office under local authority—whether office under the State—tests.

Whereas in the case of elections to the offices of President and Vice-President the holding of an office of profit even under an authority subject to the control of the Government is a disqualification under Arts. 58(1) and 66(4) it is not so prescribed in the case of members of the legislatures.

The powers of the Government to appoint a person to an office of profit or to continue him in that office or to revoke his appointment in their discretion and to make payment from out of Government revenues are important factors in determining whether that person is holding an office of profit under the Government though payment from a source other than Government revenue is not always a decisive factor. (KAPUR J.)

[The office of manager of a school run by the Durgah Khwaja Sahib Committee, *held*, not an office of profit under Government.]

Abdul Shakur v. *Rikhab Chand*, 1958 SC 52.

Art. 132—Question of law as to interpretation—classification under Art. 14.

The question of interpretation of a provision of the Constitution can arise only if two or more constructions are sought to be placed on it—one party suggesting one construction and the other a different one.

But where the parties agree on the true interpretation, it is not possible to hold that the case involves any question of law as to interpretation. For example, when both parties accept the principles governing the doctrine of classification evolved by a series of decisions on the interpretation of Art. 14, but the dispute is whether there is a valid classification under a certain statutory rule, the question raised does not involve any substantial question of law as to the interpretation of the Constitution. (SUBBA RAO J.)

State of Jammu and Kashmir v. *Ganga Singh*, 1960 SC 356 : 1960 (2) SCR 346 : 1960 SCJ 231 : 1960 (1) MLJ 67.

Appeal against finding on preliminary issue.

Under this Article an appeal lies only against judgments, decrees and final orders and not against findings on preliminary issues where there is no decree or final order, and where such findings would not, as provided in the explanation, finally dispose of the case. Hence where in a suit the defendant raises the question as to the *vires* of an enactment and that question is tried as a preliminary issue and on the finding on the preliminary issue there is an appeal to the High Court and the High Court decides that issue alone and there are other issues which have to be tried, an appeal against the decision of the High Court is not competent

under Art. 132 and the fact that a certificate has been given by the High Court under Art. 132 will not alter the position.

1940 FCR 110 Distinguished. (VENKATARAMA IYER J.)

Syedna T. Saifuddin v. *State of Bombay*, 1958 SCR 1007 : 1958 SC 253 : 1958 SCA 431 : 1958 SCJ 403 : (1958) 1 MLJ 127 : (1958) 1 An WR 127.

Appeal from decision of single Judge.

An appeal to the Supreme Court from a judgment of a single Judge of a High Court on a certificate under Art. 132(1) that the case involves a substantial question of law as to the interpretation of the Constitution, is competent and is not barred under Art. 133(3). (PATANJALI SASTRI C. J.)

Election Commission v. *Saka*, 1953 SC 210 : 1954 SCR 1144 : 1953 SCJ 293 : 1953 SCA 203 : 8 DLR SC 330 : 1953 (1) MLJ 702 : 66 LW 378 : 1954 MWN 427.

Appeal—additional evidence.

In an appeal under Art. 132(1), the Supreme Court will not permit additional evidence to be placed before it when there was sufficient opportunity for the party to place all the relevant matters before the High Court itself. (SINHA J.)

State of Uttar Pradesh v. *Manbhodhanlal*, 1958 SCR 533 : 1957 SC 912 : 1957 SCA 1022 : 1958 SCJ 150 : 1957 All WR 710 : 1957 MPC 744 : 1957 ALJ 921 : 1958 MLJ 85 (Cr.).

New plea.

Where a plea was never raised in the High Court and no evidence was let in and no finding was given by the High Court, the Supreme Court cannot enter upon an enquiry into that question in an appeal under Art. 132. (SHAH J.)

S. Singh & Co. v. *State of Orissa*, 1961 SC 196.

Art. 133—restrospective effect.

The language of the Article is prospective and therefore it applies only to judgments of a State High Court passed after the Constitution. Therefore an appeal will lie to the Supreme Court under Art. 135 from a decree of a Provincial High Court passed before the coming into force of the Constitution reversing on appeal, the decree of the trial Court in a suit the value of the subject matter of which is over Rs. 10,000/- but less than Rs. 20,000/- for in such a case the matter is one which, under the law as it then stood, jurisdiction was "exercisable" by the Federal Court. (CHANDRASEKHARA IYER J.)

Daji Saheb v. *Shankar Rao Vithal Rao*, 1955 (2) SCR 872 : 1956 SC 29 : 1956 SCJ 70 : 1956 SCA 481 : 58 Bom LR 496.

Applicability to appeals in suits instituted before 1950.

Article 133 does not expressly or by necessary intendment take away a vested right of appeal which resides in the parties to a suit instituted before the coming into force of the Constitution.

Hence where in a suit instituted before 1950 the High Court, in first appeal decided after the coming into force of the Constitution, reverses the decree of the trial court and the value of the subject matter is above Rs. 10,000 (but below Rs. 20,000), the unsuccessful party has a vested right of appeal to the Federal

Court under the provisions of sections 109 and 110 of the Civil Procedure Code as they existed before 1950. Such a vested right of appeal is a matter not falling within Art. 133 and jurisdiction and powers with respect to such right were exercisable by the Federal Court immediately before the commencement of the Constitution and consequently the party will have a right of appeal under Art. 135 to the Supreme Court, for the word "matter" in Art. 135, which is a word of wide import will cover such a vested right of appeal.

Case law discussed. (1953) Mad 1079 (FB), 1954 Cal 289, 1956 All 321, 1956 All 638, (1956) Punj 1173 and 1951 Mad 1051 Overruled.

(S. R. DAS C. J.)

Gurikapatti Veerayya v. *Subbiah Chowdhry*, 1957 SCR 488 : 1957 SC 540 : 1957 SCA 495 : 1957 SCJ 439 : (1957) 2 MLJ 1 : (1957) 2 An WR 1 : 1957 SCC 399.

Review judgement after 1950.

A decree passed on second appeal by the former Jaipur High Court before the coming into force of the Constitution was reviewed subsequently by the successor Rajasthan High Court. It was contended that under the Civil Procedure Code of Jaipur the decree of the Jaipur High Court was final and that the review judgment which modified that decree in certain respects could not confer new rights of appeal.

Held, (negativing the contention), the only operative decree was the one passed by the Rajasthan High Court and that having been passed after the Constitution an appeal lay to the Supreme Court provided the requirements of Art. 133 were fulfilled.

(MAHAJAN J.)

Nathoolal v. *Durga Prasad*, 1954 SC 355 : 1955 (1) SCR 51 : 1954 SCJ 557 : 1954 SCA 921 : 1954 Andh LJ SC 50 : 67 LW 641.

Whether applies to decisions of High Court in an election appeal.

The question whether Art. 133 applies to appellate decisions of the High Court under S. 116A of the Representation of the People Act, 1951 was raised in the following case but not decided by the Supreme Court since in its view, even if the Article did not apply it would have excused the delay in the presentation of the instant appeal.

Baru Ram v. *Smt. Prasanni*, 1959 SC 93.

Final order—order of remand.

A suit for a declaration that certain property was the private property of the plaintiff and was not a Sikh Gurudhwara was dismissed on the preliminary point that the Civil Court's jurisdiction was ousted under S. 29 (2) of the Punjab Sikh Gurudhwaras Act, 1925 though the other issues in the suit were found in favour of the plaintiff. In Letters Patent Appeal the High Court reversed the finding on the preliminary point and remanded the suit to the trial court for disposal according to law after also finally deciding that the property was private property. Leave was granted by the High Court for appeal to the Supreme Court and an appeal was preferred. During the pendency of the application for leave, the suit was decreed by the trial court and no appeal was filed against the decision. Before the Supreme Court a preliminary objection was raised as to the maintainablity of the appeal on the grounds that (1) the order of remand passed by the High Court was not a final order and (2) the decree of the trial court after remand had become conclusive.

Held (overruling the objection) that though the order of the High Court

purported to be by way of remand it in fact finally decided the matter and that the decree of the trial court must, in the circumstances of the case be taken to be subject to the result of the appeal to the Supreme Court.

10 MIA 203 Applied. (JAGANNADHADAS J.)

Shiromani Gurudwara Prabandak Committee v. *Shiv Rattan Dev*, 1955(2) SCR 67 : 1955 SC 455 : 1955 SCJ 466 : 57 Pun LR 264.

An order is final if it amounts to a final decision relating to the rights of the parties in dispute in the Civil Proceeding. If after the order the proceeding still remains to be tried and the rights in dispute determined, the order is not a final order.

In an appeal against an order refusing to set aside an award, the High Court remanded the case under S. 151 C.P.C. for retrial. *Held*, the order of remand was not a final order within the meaning of Art. 133 and no appeal lay therefrom to the Supreme Court. (SHAH J.)

Jethanand v. *State of U.P.*, 1961 SC 794.

Findings of fact.

The trial judge took one view of the evidence and the Court of appeal took another view. There being no concurrent findings, the Supreme Court allowed the appellant to place the entire evidence in support of his contention.

Asiatic Steam Navigation Co. v. *Arabinda*, 1959 SC 597.

Concurrent finding of fact.

The Supreme Court will not in second appeal disturb a concurrent finding of fact. (SARKAR J.)

Radha Kissen Chamria v. *Keshardeo Chamria*, 1957 SC 743 : 1957 SCA 944 : 1957 SCJ 775.

Whether proceeding is collusive.

Whether a proceeding is a collusive one or not is essentially a question of fact. When both the courts below have found that it is not collusive, the Supreme court will not disturb that finding unless there are sufficient grounds.

(VENKATARAMA IYER J.)

Nagubai v. *Shama Rao*, 1956 SCR 451 : 1956 SC 593 : 1956 SCA 959 : 1956 SCJ 955 : 1956 SCC 321 : (1956) Mys. 152 : 1956 An LT 1029.

Inference from entries in *Wajib-ul-Arz*.

The question whether from the *wajib-ul-arz* entries an inference of surrender or relinquishment of a sovereign right by Government can be properly drawn is not a pure question of fact, depending as it does, on the true scope and legal effect of those entries. (S. K. DAS. J.)

Rajender Chand v. *Mst. Sukhi*, 1956 SCR 889 : 1957 SC 286 : 1957 SCJ 119 : 1957 SCA 251.

Practice.

A question of fact on the basis of which no contention is raised in the pleadings, on which no issue is framed and towards which no evidence is directed cannot for the first time be raised in second appeal before the Supreme Court.

(VENKATARAMA IYER J.)

Karampura Development Co. v. *Kamashya Narain Singh*, 1956 SCR 325 : 1956 SC 446 : 1956 SCJ 511 : 35 Pat 573.

Art. 133(1) (c)—Decree making variation in favour of appellant—whether affirming decree.

In determining the character of the appellate decree the appellate decree as a whole must be looked at and compared with the decision of the trial Court as a whole and the question whether the appellate decree is one of affirmance or not, decided. In such enquiry the nature of the variation made whether it is in favour of the intending appellant or otherwise will not be relevant.

Hence when the appellate decree of the High Court makes a variation in the decision of the trial Court under appeal in favour of a party who intends to prefer an appeal against the said appellate decree, it cannot be said to affirm the decision of the trial Court under Art. 133(1) of the Constitution.

30 Ind App 35 and 51 Ind 319 Relied on ; (1957) Punj 255 FB and 35 Patna 499 Approved ;

1927 Cal 543 and (1953) Mad 1 Not Approved ; 8 CWN 294 (FB), (1952) 2 All 605, 1952 Assam 134, (1948) Bom 881, 1959 Mys 112 and (1953) Nag 784 Overruled.

[But if an appellate decree only makes a variation as to costs in favour of one party or another that would not affect the character of the appellate decree which would in law amount to a decree of affirmance. The position with regard to interest before the date of the decree however, is different. Also a variation made because of a concession made or by consent of parties or because a part of the subject matter covered by the decree has been withdrawn cannot affect the character of the appellate decree. The principle of affirmance on which the provision rests postulates either affirmance or variation by the appeal Court as an act of adjudication on merits.] (GAJENDRAGADKAR J.)

Tirumalachetti Rajaram v. *T. Radhakrishnayya*, 1961 SC 1795.

ARTICLE 136

Jurisdiction under the Article.

By virtue of this Article the Supreme Court can grant special leave in civil cases, criminal cases, income-tax cases, cases which come up before different kinds of Tribunals and in a variety of other cases. The only uniform standard which can be laid down is that special leave should be granted only in those cases where special circumstances are shown to exist. (FAZAL ALI J.)

Pritam Singh v. *State*, 1950 SCR 453 : 1950 SC 169 : 63 LW 875 : 86 CLJ 120 : 1950 MWN 605 : 51 Cr LJ 1270 : 53 PLR 1.

Nature of the power.

It is not possible to define with any precision the limitations on the exercise of the discretionary jurisdiction vested in the Supreme Court under Art. 136. The limitations, whatever they be, are implicit in the nature and character of the power itself. It being an exceptional and overriding power, naturally it has to be exercised sparingly and with caution and only in special and extraordinary situations. Beyond that it is not possible to fetter the exercise of this power by any set formula or rule.

The whole intent and purpose of this article is that it is the duty of the Supreme Court to see that injustice is not perpetuated or perpetrated by decisions of courts and tribunals because certain laws have made the decisions of these courts and

tribunals final and conclusive. Where the Income-tax Officer and the Tribunal in estimating the gross profit rate on sales did not act on any material but acted on pure guess and suspicion, it is a fit case for the exercise of power under Art. 136. (MAHAJAN C. J.)

Dhakeswari Cotton Mills Ltd. v. *Commissioner of Income-tax, West Bengal*, 1955 SCR 941 : 1955 SC 65 : 1955 SCA 96 : 1955 SCJ 122 : 1954 (26) ITR 775 : 1955 (1) MLJ 60 : 1955 Andh LT 61.

Power whether can be taken away by legislature.

The powers conferred on the Supreme Court and the High Courts under Arts. 136 and 226 respectively cannot be taken away or whittled down by the legislature by providing that the orders of a tribunal under an Act shall be conclusive and final. So long as these powers remain the discretion of these courts is unfettered.

Raj Krishna Bose v. *Binod Kanungo*, 1954 SC 202 : 1954 SCR 913 : 1954 SCJ 286 : 1954 SCA 737 : 9 DLR SC 218 : 1954 (1) MLJ 489 : 1954 MBLJ SC 11.

Prerequisites for interference.

Generally the prerequisites for the Supreme Court's interference to set right decisions of tribunals whose conclusions on questions of fact are final can be classified under the following categories, namely :—

(1) Where the tribunal acts in excess of the jurisdiction conferred upon it by the statute creating it or when it ostensibly fails to exercise a patent jurisdiction ;

(2) Where there is an apparent error on the face of the decision ; and

(3) Where the tribunal has erroneously applied well accepted principles of Jurisprudence. (GOVINDA MENON J.)

Clerks and Depot Cashiers of the Calcutta Electric Tramways v. *Calcutta Tramsways Company Ltd.*, 1956 SCR 772 : 1957 SC 78 : 1957 SCA 49.

Retrospective operation.

Art. 136 has no retrospective operation. (PATANJALI SASTRI C. J.)

Llyods Bank Ltd. v. *L. Bank I. S. Association*, 1956 SC 745.

Tribunal—Central Government acting under S. 111 of Companies Act, 1956.

The Central Government exercising appellate powers under S. 111 (before its amendment in 1960) is a tribunal exercising judicial functions and is subject to the appellate jurisdiction of the Supreme Court under Art. 136.

[In the instant case where the Central Government had not given any reasons in support of its order allowing an appeal under S. 111 against the refusal by a company to register the transfer of certain shares by a shareholder, the Supreme Court *held* that there was no proper trial of the appeals and directed the appeals to be reheard and disposed of according to law.] (SHAH J.)

Harinagar Sugar Mills Ltd. v. *Shyam Sunder Jhunjhunwala*, 1961 SC 1669.

Industrial Tribunal.

Industrial Tribunal is a tribunal within the meaning of Art. 136 and the

Supreme Court can interfere where a person has been dealt with arbitrarily or a tribunal has not given a fair deal to a litigant (BHAGWATI J.)

Muir Mills Co. Ltd. v. *Suti Mills Mazdoor*, 1955 SCR 991 : 1955 SC 170 : 1955 SCA 321 : 1955 SCJ 214 : 57 Pun LR 178 : 1955 (1) MLJ 127 : 1955 (1) Lab LJ 1 : 1955 Andh WR 127 : 1955 Andh LT (Civil) 6.

Practice—additional evidence.

The Supreme Court does not usually admit additional evidence in appeals under Art. 136. (GAJENDRAGADKAR J.)

Tika Ram and Sons Ltd. v. *Its workmen*, 1959 SCR 1287 : 1960 SC 198 : 1960 (1) Lab LJ 514 : 16 FJR 255.

Delay in applying for leave.

During the pendency of an appeal in the Supreme Court there was a reorganisation of the States and the State of Mysore came on record as the respondent in the place of the State of Madras which had not filed any application for leave to appeal against that portion of the Hight Court decree which was against it but had accepted it as correct. The State of Mysore then filed an application, very much out of time, for leave to appeal. It was contended by the appellant that leave should not be given as it will not be a sufficient ground to condone the delay that a party who had acquiesced in a judgment and deliberately allowed the time for filing an appeal to lapse, has subsequently changed his mind and desires to prefer an appeal. *Held*, though the contention was sound and should be given effect to, as, in the circumstances of the case, the result of the litigation would affect the rights of members of the public, the delay must be condoned. (VENKATARAMA IYER J.)

Venkataramana Devaru v. *State of Mysore*, 1958 SCR 895 : 1958 SC 255 : 1958 SCJ 382 : (1958) 1 An WR 109 : (1958) 1 MLJ 109.

Dismissal of application—reasons.

It is not the practice of the Supreme Court to give reasons for the dismissal of an application for special leave. (JAGANNADHADAS J.)

Associated Tubewells Ltd. v. *Gujarmal Modi*, 1957 SC 742 : 1957 SCA 942 : 1957 SCJ 725 : (1957) Pun 1881 : 1957 (2) MLJ 137 : 1957 (2) An WR 137 : 60 Punj LR 9.

Grant of leave—reconsideration.

It is open to the Court to question the propriety of the leave granted at the time of the hearing of the appeal, unless the Court is satisfied that the appeal raises a question that justifies the exercise of its discretionary jurisdiction under Art. 136, the appeal is liable to be dismissed without going into the merits of the case. (SUBBA RAO J.)

Baldota Bros. v. *Libra Mining Works*, 1961 SC 100.

(Followed in *Chandi Prasad* v. *State of Bihar*, 1961 SC 1708.)

Where the Supreme Court regards as not properly certified an appeal actually admitted by leave granted by the High Court under Art. 134 (1) (c) and declines to accept it as such it may still examine whether the case is a fit one for its special powers under Art. 136 to be exercised. (SINHA J.)

Baladin v. *State of Uttar Pradesh*, 1956 Cr LJ 345 : 1956 SC 181.

Questions of fact.

In an appeal by special leave, the Supreme Court cannot consistently with its practice, convert itself into a third court of facts. (S. R. DAS J.)

Gurubaksh Singh v. *State of Punjab*, 1955 SC 320 : 1955 Cr LJ 873.

In a special leave Appeal under Art. 136, it is not open to the appellant to re-agitate questions of fact and ask the court to disturb the findings of fact arrived at by the Courts below. (GHULAM HASAN J.)

Kunjilal v. *State of Madhya Pradesh*, 1955 SCR 872 : 1955 SC 280 : 1955 SCJ 592 : 1955 Nag LJ 84 : 1955 Cr LJ 730 : 1955 (2) MLJ 96: 1955 MWN 707 : 1955 All WR 97.

Burden of proof wrongly laid.

The Supreme Court will not permit a finding of fact to be reopened in an appeal on special leave, irrespective of the question whether the burden of proof was rightly laid on the concerned person. (JAGANNADHADAS J.)

B. K. Joshi v. *B. N. Biyani*, 1955 SC 610.

Whether respondent can reagitate questions decided against him.

Or. 41 R. 22 of the Code of Civil Procedure has no application to an appeal by special leave and the respondent cannot, where there is no appeal on his behalf, be permitted to support the decision of the Tribunal on other grounds which had been found against him by the Tribunal. (GHULAM HASAN J.)

Vasisht Narain Sharma v. *Dev Chandra*, 1954 SC 513 : 1955 SCR 509 : 1955 SCA 41 : 1954 SCJ 717 : 1954 ALJ 525 : 1954 (2) MLJ 379.

[But see *Baru Ram* v. *Smt. Prasanni*, 1959 SC 93 where the Supreme Court observed that there was, *prima facie*, some force in the contention that it should be open to the respondent in an appeal by special leave to support the conclusion of the High Court on grounds decided against him but did not think it necessary to decide the point in the instant case.]

Findings of fact—when may be disturbed.

The usual practice of the Supreme Court in special appeals is not to disturb findings of facts by Tribunals unless there are exceptional grounds therefor. But when the Tribunal has spoken in two voices and has given inconsistent and conflicting findings it becomes necessary for the Supreme Court to determine which of the findings should be accepted as supported by materials. (VENKATARAMA IYER J.)

Pipraich Sugar Mills v. *P. S. Mills Mazdoor Union*, 1956 SCR 872 : 1957 SC 95 : 1957 SCA 28 : 1957 SCJ 38 : 1957 (1) Lab. LJ 235.

The Supreme Court will not ordinarily interfere with findings of fact given by the trial court and the appellate Court, but if in giving the findings the courts ignore certain important pieces of evidence and other equally important pieces of evidence are shown to have been mis-read and mis-construed and the Supreme Court comes to the conclusion that on the evidence taken as a whole no tribunal could properly as a matter of legitimate inference arrive at the conclusion that it has, interference is called for. (KAPUR J.)

Earnist J. White v. *Kathlean O. White*, 1958 SC 441 : 1958 SCR 1410 : 1958 SCA 1108 : 1958 SCJ 839 : 1958 (2) An WR 125 : 1958 (2) MLJ 125 : 1958 MPC 594 : 1958 MLJ (Cr) 631 : 1958 ALJ 671 : 1958 BLJR 714 ; 37 Pat 994.

Misapprehension as to finding.

Where the two lower Appellate Courts were under a clear misapprehension as to a finding of fact by the trial court, which affected the examination of the evidence by the High Court itself, *held*, the Supreme Court had to examine the evidence itself. (SARKAR J.)

Kaushal Kishore v. *Ram Dev*, 1958 SC 999.

Findings of fact by tribunal—reopening of.

The Supreme Court in an appeal by special leave does not ordinarily re-open findings of fact recorded by a competent tribunal. (SINHA J.)

Surendranath Khosla v. *S. Dalip Singh*, 1957 SCR 179 : 1957 SC 242 : 1957 SCJ 162 : 1957 SCA 433 : 1957 KLT 319 : 1957 Nag LJ 193 : 1957 MPLJ 249 : 1957 SCC 137 : 1957 An LT 174.

Election Tribunal.

The Supreme Court will not in special appeal review findings of fact recorded by an Election Tribunal (under the Representation of the People Act, 1951) if there is evidence on which they could be reached. (VENKATARAMA IYER J.)

Nagappa v. *Basappa*, 1955 SC 756 : 1956 SCA 111 : 1956 SCC 37.

The question when the candidature of a candidate for election to the Legislature commences under S. 79(b) of the Representation of the People Act, is one of fact and the decision of the Election Tribunal on that question is not liable to be reviewed by the Supreme Court in special appeal. (VENKATARAMA IYER J.)

Khader Sheriff v. *Munnuswami*, 1955 (2) SCR 469 : 1955 SC 775 : 1956 SCA 433 : 1955 SCJ 803 : 1956 MWN 160 : 1955 (2) MLJ 297 : 1956 Nag LJ 135.

Income-tax Appellate Tribunal.

In an appeal by special leave from the decision of the Income-tax Appellate Tribunal, the Supreme Court cannot be asked to reassess the evidence and come to its own conclusion, where the view taken by the Tribunal is a reasonably possible view on the evidence adduced and where it cannot be said that the view is not supported by the evidence or is unreasonable. (SARKAR J.)

Sovachand Baid v. *Commissioner of Income-tax*, 1959 SC 59 : 34 ITR 650.

Inadequacy of evidence.

The question of inadequacy of the material on which the conclusion as to the genuineness of certain letters is arrived at is not a matter which can be canvassed in an appeal by special leave under Art. 136. (JAGANNADHA DAS J.)

Mobarik Ali Ahmed v. *State of Bombay*, 1958 SCR 328 : 1957 SC 857 : 1958 SCJ 111 : 1957 Cr LJ 1346 : 1958 MLJ 42 (Cr) : 1958 All WR 112 : 1958 SCA 665 : 61 Bom LR 58.

Question of Benami.

The question whether a person is benamidar or not, is purely one of fact, and a finding thereon cannot be interfered with in special appeal, if there is evidence on which it could be based. (VENKATARAMA IYER J.)

Chattanatha Karayalar v. *Ramachandra Ayyar*, 1955 (2) SCR 477 : 1955 SC 799 : 1956 SCJ 1 : 1956 SCA 361 : 1956 (1) MLJ 1 : 58 Pun LR 314 : 1956 KLT 371.

New Plea.

A question of fact which was not raised before the Tribunal and which was conceded before the High Court cannot be allowed to be taken by the appellant in an appeal by special leave.

Dr. Y. S. Parmar v. *Hira Singh Pal*, 1959 SC 244.

Interference with exercise of discretion.

It is not the practice of the Supreme Court in special leave cases and in exercise of its overriding powers to interfere with a matter which rests in the discretion of the High Court except in very exceptional cases.

[In the instant case, the Supreme Court accepted an apology tendered by a contemner, which apology had been rejected by the High Court.]

M. Y. Shareef v. *Judges of the Nagpur High Court*, 1955 SCR 757 : 1955 SC 19 : 1955 SCA 205 : 1955 SCJ 54 : 1955 BLJR 112 : 1955 Cr LJ 133 : 1955 All WR 6 : 1955 ALJ 90 : 1955 (1) MLJ 13 : 57 Pun LR 198 : 1955 And LT (Cr) 72 : 1954 MWN 1003.

Where the High Court has, in exercise of its discretion, refused to give an injunction, the plaintiff is not entitled to be granted special leave against such a purely discretionary order. (SUBBA RAO J.)

Baldota Bros. v. *Libra Mining Works*, 1961 SC 100.

Powers of Supreme Court.

In an appeal against the dismissal of an application under Art. 227 by the High Court, the Supreme Court can exercise the same power of superintendence which the High Court has under Art. 227. (S. K. DAS J.)

Baldeo Singh v. *State of Bihar*, 1957 SC 612 : 1957 SCJ 535 : 1957 Cr LJ 998 : 1957 (1) MLJ 485 : 1957 SCC 375 : 36 Pat 746.

Art. 137—review application—duty of Counsel.

It is not consistent with the dignity of the court and the decorum of the Bar that any course should be permitted which may lead to controversy as to what a judge stated in Court and what view he held. Such matters are to be determined only by what is stated in the record of the Court. That which is not so recorded cannot be relied upon giving scope to controversy.

Hence in an application for review of an order of dismissal of an application for special leave to appeal it is highly improper for counsel to assume and assert as to what a judge's view was in making a particular order when the order pronounced does not set it out and to make references to what judges say in the course of arguments and make that a ground for re-hearing. (JAGANNADHA DAS J.)

Associated Tubewells Ltd. v. *Gujarmal Modi*, 1957 SC 742 : 1957 SCA 942 : 1957 SCJ 725 : (1957) Pun 1881 : 1957 (2) MLJ 137 : 1957 (2) An WR 137 : 60 Punj LR 9.

Art. 145(3)—'Case'—whether means entire case.

The splitting up of cases into different stages for hearing and decision is not repugnant to the Constitution or the general principles of procedural law. The

underlying principle of the Constitution is clear and all that it insists upon is that all constitutional questions should be heard and decided by a Bench of not less than five judges. As long as this requirement is fulfilled there can be no constitutional objection to the rest of the case being disposed of by a Division Bench of less than five judges, so as to save the time of the Constitution Bench of five or more judges.

There is nothing in principle which requires that a case must always be decided in its entirety by one judge or one set of judges even though such a case may conveniently be dealt with in two or more stages. Hence the contention that when once a matter involving a constitutional point is posted before a Constitutional Bench it must decide the entire case and cannot after deciding the constitutional issues leave the rest of the case to be decided by a Division Bench is not well-founded and therefore cannot be accepted. (S. R. DAS J.)

Shiva Bahadur Singh v. *State of Vindhya Pradesh*, 1955 (2) SCR 206 : 1955 SC 446 : 1955 SCA 661 : 1955 SCJ 483 : 1955 (2) MLJ 41 : 1955 MWN 1004.

Art. 154 (1) and Art. 166 (1) & (2)—Notification issued in the name of Governor.

While Art. 166(1) merely prescribes how orders are to be made, the authentication referred to in Art. 166(2) indicates the manner in which a previously made order should be embodied. The term 'executive' in Art. 154(1) is used in the broader sense as including both a decision as to action and the carrying out of the decision.

Where an order of the Government is expressed to be in the name of the Governor and is authenticated by the Additional Secretary to the Government as prescribed by Art. 166 (2), the validity of the order cannot be called in question on the ground that it is not the order of the Governor.

Even if the order did not originate from the Governor personally but was made by one duly authorised by him under Art. 154(1), the Governor remains responsible for the action of his subordinates in his name.

1945 PC 156 Relied on ; 1954 Pat 513 Affirmed. (AYYANGAR J.)

State of Bihar v. *Rani Sonabati Kumari*, 1961 SC 221.

Art. 166(1) & (2)—substantial compliance.

A notice signed by the Chief Secretary of the State and expressed to be on behalf of the Government and giving opportunity to the petitioner to show cause against the action proposed to be taken against him will be substantial compliance with the provisions of the Article which are directory only. (MAHAJAN C. J.)

P. Joseph John v. *State of Travancore-Cochin*, 1955 SCR 1011 : 1955 SC 160 : 1955 SCA 85 : 1955 SCJ 221 : 1955 Andh WR 134 : 1955 (1) MLJ 134 : 1955 KLT 351 : 1956 (1) Lab LJ 235.

Order signed by Secretary.

Where an order stated "The State Government is pleased to direct....." and was signed by the Secretary to Government by order of the Governor, *held*, the substance of the requirements of Art. 166 (1) was there. (BOSE J.)

State of Bombay v. *Purshottam Jog*, 1952 SC 317 : 1952 SCR 674 : 1952 SCJ 503 : 1952 (2) MLJ 338 : 1952 Cr LJ 1269 : BLR 1952 SC 351 : 54 Bom LR 869 : 7 DLR SC 366 : 1953 SCA 893.

Proof of order of Government—mode.

It is not necessary to call the Minister in charge in every case. If the Secretary or any other person has the requisite means of knowledge and his affidavit is believed, that will be enough. But in such cases the verification of the affidavit should be modelled on the lines of Order 19 Rule 3 of the Civil Procedure Code, whether the Code applies in terms or not ; and when the matter deposed to is not based on personal knowledge the sources of information should be clearly disclosed.

37 Cal 259 Approved. (BOSE J.)

State of Bombay v. *Purshottam Jog*, (*ibid.*).

Arts. 190(3) and 192(1)—scope.

These provisions are applicable only to disqualifications to which a member becomes subject after he is elected as such and not to those which arose long before his election. (PATANJALI SASTRI C. J.)

Election Commission v. *Saka Venkatarao*, 1953 SC 210 : 1953 SCR 1144 : 1953 SCJ 293 : 1953 SCA 203 : 8 DLR SC 330 : 1953 (1) MLJ 702 : 66 LW 378 : 1954 MWN 427.

Art. 191—Office of profit—Patels and Shanbogs of Mysore.

Patels and Shanbogs governed by the Mysore Village Offices Act, 1958 are holders of offices of profit under the Government and are disqualified under Art. 191. It may be that under the statute the Government has no option but to appoint the heir to the office if he has fulfilled the statutory requirements. The appointment being by the Government the office to which it is made must be held under it. The fact that the Government cannot refuse to make the appointment or the officer is not liable to dismissal at the pleasure of the Government does not alter the situation. The fact that under the rules cash allowances are not paid directly by the Government to these officers but the latter are authorised to deduct the amounts thereof from the revenue collected by them does not show that the cash remuneration is not paid by the Government. (SARKAR J.)

M. Ramappa v. *Sangappa*, 1958 SC 937.

Art. 226—not retrospective.

Art. 226 has no retrospective operation and transactions which are past and closed and the rights and liabilities which have accrued and vested will remain unaffected. Hence where an order of dismissal of a Government servant was passed on a departmental enquiry before the coming into force of the Constitution, the fact that an appeal and a revision from that order of dismissal were preferred and dismissed after that date will not, even if the order of dismissal was a nullity on the ground that it was passed disregarding the rules of natural justice, be of any avail for asking the High Court to exercise its newly acquired jurisdiction and powers under Art. 226 to quash the proceedings, for that will certainly amount to giving the provisions of Art. 226 restrospective operation. (S. R. DAS C. J.)

State of Uttar Pradesh v. *Mohammad Nooh*, 1958 SC 86 : 1958 SCR 595 : 1958 SCJ 242 : 1958 SCA 73 : 1957 (2) All 422.

Territorial Jurisdiction.

The writs issued by the High Court cannot run beyond the territories subject to its jurisdiction ; and the person or authority to whom the Court is empowered to issue such writs must be "within those territories" which clearly implies that they must be amenable to its jurisdiction either by residence or by location within those territories.

[Issue of writ to the Election Commission, New Delhi, by the High Court of Madras quashed.] (PATANJALI SASTRI C. J.)

Election Commission v. *Saka Venkatarao*, 1953 SC 210 : 1954 SCR 1144 : 1953 SCJ 293 : 1953 SCA 203 : 8 DLR SC 330 : 1953 (1) MLJ 702 : 66 LW 378 : 1954 MWN 427.

"Including in appropriate cases any Government".

The clause "including in appropriate cases any Government" goes with the preceding word "authority" and on a plain and reasonable construction it means that the word "authority" in the context may include any Government in an appropriate case. The position, therefore, is under Art. 226 power is conferred on the High Court to issue to any person or authority or in a given case to any Government writs or orders therein specified. (SINHA C. J.)

Lt. Col. Khajoor Singh v. *Union of India*, 1961 SC 532.

Writs against Union Government—Jurisdiction.

The writ of the High Court cannot run beyond the territories subject to its jurisdiction and the person or authority affected by the writ must be amenable to the jurisdiction either by residence or location within those territories.

1953 SCR 1144 Relied on.

So far as a natural person is concerned he is within those territories if he resides there permanently or temporarily. So far as an authority (other than a Government) is concerned it is within those territories if its office is located there. So far as a Government is concerned it is within those territories only if its seat is within those territories and Art. 226 does not refer to the place where the Government may be functioning.

In the case of the Union Government it is common knowledge that the seat of the Government of India is in New Delhi and the Government as such is located there. The non-mention of this seat in the Constitution makes no difference to this fact for what Art. 226 requires is residence or location as a fact.

The residence or location of the person affected can have no relevance on the question of the High Court's jurisdiction nor can the concept of the cause of action be introduced in Art. 226 which does not refer anywhere to the accrual of cause of action and to the jurisdiction of the High Court depending on the place where the cause of action accrues being within its jurisdiction.

Hence in the case of an impugned order of the Union Government the High Courts (except the Punjab High Court which has territorial jurisdiction over Delhi area) have no jurisdiction to issue writs, under Art. 226, even though the order may have effect within the territories within their jurisdiction or the person affected by the order resides there or the cause of action may have arisen within those territories. This no doubt may result in some inconvenience to aggrieved persons residing far away from New Delhi, but the remedy seems to be a Constitutional amendment.

1953 SCR 1144 and 1954 SCR 738 Followed ; (1953) 2 All 289 Overruled. (SINHA C. J.)

Lt. Col. Khajoor Singh v. *Union of India*, 1961 SC 532.

Writs to Income-tax Investigation Commission.

Held : The Punjab High Court has jurisdiction to issue writs to the Income-tax Investigation Commission located within its jurisdiction but investigating the case of petitioners who were assessees belonging to U.P. where their assessments were to be made.

1951 Punjab 74 Reversed ; 70 Ind. App. 129 Explained. (MUKHERJEA J.)

K. S. Rashid & Son v. *Income-tax Investigation Commission*, 1954 SC 207 : 1954 SCR 738 : 1954 SCJ 264 : 1954 SCA 264 : 9 DLR SC 233 : 25 ITR 167.

The Travancore-Cochin High Court has jurisdiction to issue a writ to the authorised official of the Indian Income-tax Investigation Commission under the Travancore Taxation on Income (Investigation Commission) Act, who is resident in and has an office within the State of Travancore. (BHAGWATI J.)

T. K. Musaliar v. *Venkatachalam Potti*, 1955 (2) SCR 1196 : 1956 SC 246 : 1956 SCA 259.

Authority becoming *functus Officio.*

Art. 226 defines the limit of the power conferred on the High Court to issue writs and directions by enacting that it could be exercised over any person or authority within the territories in relation to which it exercises its jurisdiction. The emphasis is on the words "within the territory", and their significance is that the jurisdiction to issue writs is co-extensive with the territorial jurisdiction of the Court. The reference is not to the nature and composition of the Court or tribunal but to the area within which the power could be exercised. Hence the contention that the Article posits there exists a person or authority to whom it could be issued and, consequently, it cannot be issued when no such authority exists or the authority has become *functus Officio* cannot be accepted.
(VENKATARAMA IYER J.)

Hari Vishnu v. *Ahmed Ishaque*, 1955 SCR 1104 : 1955 SC 233 : 1955 SCJ 267 : 1955 SCA 105 : 1955(1) MLJ 157 : 1955 Nag LJ I : 1955 MWN 449 : 1955 All W 339 : 1955 Andh LT (Cr) 350.

Writ against private individual.

Where a person is evicted in contravention of the express provisions of the Public Premises (Eviction) Act, 1950, section 3, a writ of mandamus could be issued against the Union of India to restore possession to the person, if it is still in possession. But where, however, the premises is in the possession of another displaced person to whom it was allotted subsequently and it is not shown that there was collusion between him and the Union Government or that he had knowledge that the eviction of the other person was illegal, a writ of mandamus cannot issue directing him to deliver possession to the person unlawfully evicted. (IMAM J.)

Sohan Lal v. *Union India*, 1957 SC 529 : 1957 SCJ 489 : 1957 SCA 417 : 1957 MPC 466 : 1957 BLJR 566 : 1957 (2) MLJ 50 : 1957 (2) An WR 50 : 1957 All WR 598 : 1957 All LJ 682 : (1957) Punj 1542.

Election Tribunals.

The High Court has power under Art. 226 to issue a writ of *certiorari* for quashing the decision of a Tribunal (an Election Tribunal in this case) notwithstanding that it has become *functus officio* after pronouncing the decision, for

the writ of *certiorari* is directed against a record and hence the continued existence of the Court or Tribunal is not a condition for its decision being annulled

1921(2) AC 570 Distinguished ; 1954 Nag 166 Reversed.
(VENKATARAMA IYER J.)

Hari Vishnu v. *Ahmed Ishaque*, 1955 SCR 1104 : 1955 SC 233 : 1955 SCA 105 : 1955 SCJ 267 : 1955 Nag LJ 1 : 1955 (1) MLJ 157 : 1955 MWN 449 : 1955 All WR 339 : 1955 Andh LT (Civil) 350.

The power of the High Court to issue a writ of *certiorari* against decisions of election tribunals remains unaffected by Art. 329(b).

1954 SC 520 Referred to ; Majority view in 1954 Nag 166 Disapproved.
(VENKATARAMA IYER J.)

Hari Vishnu v. *Ahmed Ishaque*, (*ibid*).

Jurisdiction over Election Tribunal.

The jurisdiction which Arts. 226 and 136 confer entitles the High Courts and the Supreme Court to examine the decisions of all Tribunals to see whether they have acted illegally. That jurisdiction cannot be taken away by a legislative device that purports to confer power on a tribunal to act illegally by enacting a statute that its illegal acts shall become legal the moment the tribunal chooses to say they are legal. The legality of an act or conclusion is something that exists outside and apart from the decision of an inferior tribunal.

It is a part of the law of the land which cannot be finally determined or altered by any tribunal of limited jurisdiction. The High Courts and the Supreme Court alone can determine what the law of the land is *Vis a vis* all other courts and tribunals and they alone can pronounce with authority and finality on what is legal and what is not. All that an inferior tribunal can do is to reach a tentative conclusion which is subject to review under Arts. 226 and 136. That jurisdiction is not taken away by S. 105 of the Representation of the People Act, 1951.

That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Art. 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily ; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of cases unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into Courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of cases. (BOSE J.)

Sangram Singh v. *Election Tribunal, Kotah*, 1955 (2) SCR 1 : 1955 SC 425 : 1955 SCA 545 : 1955 SCJ 431 : 1955 (2) MLJ 3 : 1955 MWN 844 : 69 MLW 1 : 10 Ele LR 293.

Interlocutory orders of Election Tribunal.

The jurisdiction of a High Court to issue writs against orders of an Election Tribunal is undoubted ; but having regard to the amendment in the Election Law which now provides a right of appeal and the obvious intention of the Legislature that proceedings before the Tribunal should go on with expedition and

without interruption and that any error in its decision should be set right in an appeal, it will be a proper exercise of discretion under Art. 226 to decline to interfere with interlocutory orders. (VENKATARAMA IYER J.)

Veluswami Thevar v. *Raja Namiar*, 1959 SC 422.

Remedy when available.

A notice under a taxation law calling upon a person forthwith to submit a return places upon him considerable hardship and liability which if the law is *ultra vires* constitute an infringement of his right entitling him immediately to apply to the appropriate Court for redress even though there may have been no actual assessment.

In such a case the plea that an adequate alternative remedy under the impugned law itself is available by way of appeal or revision will not avail the State when a party comes to court with an allegation that his right has been infringed by a law which is *ultra vires*.

1952 SCR 135 Ref. to ; 1953 Pat 87 Reversed. (S. R. DAS AG. C. J.)

Bengal Immunity Co. v. *State of Bihar*, 1955 SC 661 : 1955 (2) SCR 603 : 1955 SCJ 672 : 1955 SCA 1140 : 1955 (2) MLJ 168 : 34 Pat 905 : (55) 6 STC 446.

Sales Tax law.

If a Sales Tax Act constitutes an infringement of Art. 286 and is *ultra vires*, the remedy by way of writ must, on principle and authority, be available to the party aggrieved.

1953 Patna 87 Reversed. (S. R. DAS AG. C. J.)

Bengal Immunity Co. Ltd. v. *State of Bihar*, (*ibid.*).

Availability of other remedy.

The remedy provided in the Article is a discretionary one and the court may refuse to exercise the discretion when the aggrieved party is pursuing an alternative remedy provided for by the statute and is awaiting decision. (MUKHERJEA J.)

K. S. Rashid & Son v. *Income-tax Investigation Commission*, 1954 SC 207 : 1954 SCR 738 : 1954 SCJ 264 : 1954 SCA 264 : 9 DLR SC 233 : 25 ITR 167.

Does not affect jurisdication.

It is true that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ, but the existence of an adequate legal remedy is a thing to be taken into account in the matter and where such remedy exists, it will be a sound exercise of discretion to refuse to interfere in a petition under Art. 226 unless there are good grounds therefor. (VENKATARAMA IYER J.)

Union of India v. *T. R. Varma*, 1957 SC 882 : 1958 SCA 110 : 1958 All WR 165 : 1958 SCJ 142 : (1957) 13 FJR 231 : 1958 (1) MLJ 66 : 1958 MPC 61 : 1958 All LJ 126 : 60 Punj LR 126.

When the principle does not apply.

The principle that a Court will not issue a prerogative writ when an adequate alternative remedy is available cannot apply when a party comes to Court alleging that his fundamental right has been infringed and seeks relief under Art. 226.

State of Bombay v. *United Motors (India) Ltd.*, 1953 SC 252 : 1953 SCR 1069.

Followed in *Himmatlal H. Mehta* v. *State of Madhya Pradesh*. 1954 SC 403 : 1954 SCR 1122 : 1954 SCJ 445 : 1954 SCA 654 : 1954 (1) MLJ 690 : 67 LW 629 : 1954 MWN 802 (reversing 1952-3 STC 448.)

Procedure.

When relief under Art. 226 is sought on allegations of infringement of fundamental rights, the Court should satisfy itself that such allegations are well founded before proceeding further with the matter. (PATANJALI SASTRI C. J.)

State of Bombay v. *United Motors Ltd.*, 1953 SC 252 : 1953 SCR 1069 : 1953 SCJ 373 : 1953 SCA 408 : 8 DLR SC 294 : 55 Bom. LR 536 : 1953 (1) MLJ 743 : 66 LW 577 : 1953 STC 133.

Disputed question of fact.

It is not the practice of Courts in writ petitions to decide questions on which there is a serious dispute, and which cannot be satisfactorily decided without taking evidence. (VENKATARAMA IYER J.)

Union of India v. *T. R. Varma*, 1958 SCR 499 : 1957 SC 882 : 1958 SCA 110 : 1958 SCJ 1442 : (1957) 14 FJR 237 : 1958 (1) MLJ 66 : 1958 MPC 61 : 1958 All LJ 126 : 1958 All WR 156 : (1958) Punj 274 : 60 Punj LR 126.

Hearing of the parties.

Where the High Court after a mere perusal of an application for a writ of prohibition restraining an Industrial Tribunal from proceeding with a reference made to it by the Government of certain alleged disputes, on the ground that the items referred were covered by relative items in a previous reference, dismissed the application *in limine* without affording the parties a hearing to represent their views ;

Held, the High Court was not justified in doing so and as the items in the reference though ostensibly differently worded were alleged to be identical with those in the previous reference it was the duty of the High Court to hear the parties, consider their statements and evidence, if any, adduced by them and then recorded its decision. (Case remanded.) (BHAGWATI J.)

British India Corporation Limited v. *Industrial Tribunal, Punjab*, 1957 SC 354.

Grant of interim relief.

The language of Article 226 shows that the issue of writs and directions by the Court is founded only on its decision that a right of the aggrieved party under Part III of the Constitution has been infringed. It can also issue writs or give similar directions for any other purpose. The concluding words of Art. 226 have to be read in the context of what precedes the same. Therefore the existence of the right is the foundation of the exercise of jurisdiction of the court under this Article. Article 226 cannot be used for giving interim relief as the only and final relief on an application when the Court declines to decide the rights of parties and directs them to a civil suit, for an interim relief can be granted only in aid of and ancillary to the main relief which may be available to the party on determination of his rights in a proceeding.

(1951) Cuttack 398 Reversed.

[In the instant case the Supreme Court set aside the grant by the High Court of a temporary injunction restraining the State Government from disturbing the party's (respondent in the appeal) possession till the expiry of the period of the prescribed notice under S. 80 C.P.C. for a suit to which the aggrieved party was referred.] (KANIA C. J.)

State of Orissa v. *Madan Gopal Rungta*, 1952 SC 12 : 1952 SCR 29 : 1951 SCJ 764 : 7 DLR SC 63 : BLR 1952 SC 45 : 1952 MWN 13 : 1951 (2) MLJ 645.

Oral examination of petitioner.

Where the High Court put certain questions to the petitioner who was present at the hearing of the writ petition and formed a certain opinion of him on which it based its conclusion,

Held, this was a consideration which ought not to have been taken into account in a judicial determination. (VENKATARAMA IYER J.)

Union of India v. *T. R. Varma*, 1958 SCR 499 : 1957 SC 882 : 1958 SCA 110 : 1958 SCJ 142 : (1957) 13 FJR 237 : 1958 (1) MLJ 66 : 1958 MPC 61 : 1958 All LJ 126 : 1958 All WR 156 : (1958) Punj 274 : 60 Punj LR 126.

Writ of Mandamus—Function of Court.

It is not the function of the Courts of law to substitute their wisdom and discretion for that of the persons to whose judgment the matter in question is entrusted by the law.

1952 Orissa 1 Criticised. (BOSE J.)

Vice Chancellor, Utkal University v. *S. K. Ghosh*, 1954 SC 217 : 1954 SCR 883 : 1954 SCJ 252 : 1954 SCA 311 : 9 DLR SC 231 : (1954) Orissa 288.

High Court whether Court of appeal.

In applications for a writ of mandamus the High Court cannot constitute itself into a court of appeal from the authority against which the writ is sought.

1952 Orissa 1 Approved (but reversed on facts). (BOSE J.)

Vice Chancellor, Utkal University v. *S. K. Ghosh*, (*ibid.*).

Assessment proceedings.

When a Sales Tax Act has been declared *ultra vires*, an imposition of tax pursuant to such law will be without the authority of law and hence a threat by the State by using the coercive machinery of the Act to realise the tax from a citizen will be sufficient infringement of his fundamental right under Art. 19(1)(g) entitling him to relief under Art. 226.

Himmatlal H. Mehta v. *State of Madhya Pradesh*, 1954 SC 407.

Against Income-tax Officer.

A writ of mandamus can be issued to compel the Income-tax officer to carry out the directions given to him by the Income-tax Appellate Tribunal.

1956 Bhopal 18 Reversed.

Bhopal Sugar Industries Ltd. v. *I. T. Officer*, 1961 SC 182.

Delay in renewal of motor permit.

If there is inordinate delay in the disposal of an application for renewal of permit under Ss. 58(2) and 57 of the Motor Vehicles Act, the affected party may ask for a writ of mandamus to direct the appropriate authority to dispose it of within a reasonable time.

Samrath Transport Co. v. *R. T. A. Nagpur*, 1961 SC 93.

Writs of Prohibition.

It is well settled that where proceedings in an inferior Court or Tribunal are partly within and partly without its jurisdiction, prohibition will lie against doing what is in excess of jurisdiction. (S. K. DAS J.)

Sewpujan Rai Indrasanarai v. *Collector of Customs*, 1958 SC 845 : 1958 SCJ 1199.

Writs of Prohibition and *Certiorari*—Distinction.

The fundamental difference between a writ of Prohibition and a writ of *certiorari* is that they are issued at different stages of a proceeding. When an inferior court takes up for hearing a matter over which it has no jurisdiction the person against whom proceedings are taken may move the superior Court for the issue of a writ of prohibition forbidding the inferior Court from continuing the proceedings ; while if the inferior Court hears that cause and gives a decision the party aggrieved would have to move the superior Court for a writ of *certiorari* quashing the decision on the ground of want of jurisdiction.

(VENKATARAMA IYER J.)

Hari Vishnu v. *Ahmad Ishaque*, 1955 SCR 1104 : 1955 SC 233 : 1955 SCA 105 : 1955 SCJ 267 : 1955 Nag LJ 1 : 1955 (1) MLJ 157 : 1955 MWN 449 : 1955 All WR 339.

Certiorari—**General principles.**

One of the fundamental principles in regard to the issuing of *certiorari* is that it can be availed of only to remove or to adjudicate on the validity of "judicial acts" which expression includes the exercise of quasi-judicial functions by administrative bodies or other authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministerial acts.

The second essential feature is that the control which is exercised through it over such tribunals or bodies is not in an appellate but a supervisory capacity. The superior Court does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but it does not substitute its own views for those of the inferior tribunal. (MUKHERJEA J.)

T. C. Basappa v. *T. Nagappa*, 1954 SC 440 : 1955 SCR 250 : 1954 SCJ 695 : 1954 SCA 620 : (1954) Mys. 235 : 67 LW 213.

When may issue.

When the law under which the executive authority is making a decision itself requires a judicial approach, the decision will be quasi-judicial. Whenever a body of persons having legal authority to determine questions affecting rights of parties and having the duty to act judicially act in excess of their legal authority a writ of *certiorari* may issue. (KANIA C. J.)

Province of Bombay v. *Kushaldas Advani*, 1950 SCR 621 : 1950 SC 222 : 1950 SCJ 451 : 1950(2) MLJ 703 : 1950 MWN 802 : 53 BLR 1 : 86 CLJ 330.

Judicial tribunal—tests.

A true judicial decision presupposes an existing dispute between two or more parties and then involves four requisites :—(1) The presentation (not necessarily orally) of their case by the parties to the dispute ; (2) If the dispute between them is on a question of fact, the ascertainment of that fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence ; (3) If the dispute between them is on a question of law, the submission of legal arguments by the parties ; and (4) A decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found, including when required a ruling upon any disputed question of law.

(1937) 2 K.B. 309 Relied on. (BHAGWATI J.)

Maqbool Hussain v. *State of Bombay*, 1953 SC 325 : 1953 SCR 730 : 1953 SCJ 456 : 1953 SCA 641 : 8 DLR SC 365 : 56 Bom LR 13 : 1953 (2) MLJ 113 : 1953 MWN 648 : 54 Cr LJ 1432.

Nature of tribunal—how to be determined.

The decisions of the Supreme Court lay down that whether an administrative tribunal has a duty to act judicially should be gathered from the provisions of the particular statute and the rules made thereunder and if the authority is called upon to decide respective rights of contesting parties or, to put it in other words, if there is a *lis*, ordinarily there will be a duty on the part of the authority to act judicially. (SUBBA RAO J.)

Gullapalli Nageswara Rao v. *Andhara Pradesh Road Transport Corporation*, 1959 SC 308 : 1959 SCJ 967 : 1959 (2) Andh WR 156.

Administrative orders.

When the executive authority has to form an opinion about an objective matter as to a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an executive character and are not amenable to a writ of *certiorari*.

Held, the decision of the Provincial Government under Sections 3 & 4 of the Bombay Land Requisition Ordinance, 1947 about public purpose is not a judicial or quasi-judicial decision and there is no scope for an application for a writ of *certiorari*.

1949 Bom. 277 Reversed. (KANIA C. J.)

Province of Bombay v. *Khushaldas Advani*, 1950 SC 222 : 1950 SCR 621 : 1950 SCJ 451 : 53 Bom LR 1 : 1950 (2) MLJ 703 : 1950 MWN 802 : 86 CLJ 330.

Executive instructions.

The directions issued by G.O. 1298 issued by the Government of Madras dated 28-4-1956 are no more than executive or administrative instructions for the guidance of Transport authorities of the State and hence even if the rule as to assignment of marks has been infringed, it is not an error of law which can be corrected by a writ of *certiorari*. (GAJENDRAGADKAR J.)

Abdulla Rowther v. *State Transport Appellate Tribunal, Madras*, 1959 SC 896.

Issue of *certiorari*—principles.

The following propositions are well settled :—

(1) *Certiorari* will be issued for correcting errors of jurisdiction as when an inferior court or Tribunal acts without jurisdiction or in excess of it or fails to exercise it ;

(2) *Certiorari* will also be issued when the Tribunal acts illegally in the exercise of its undoubted jurisdiction as when it decides without giving an opportunity to the parties to be heard or violates the principles of natural justice ;

(3) The Court issuing a writ acts in exercise of a supervisory and not appellate jurisdiction and, therefore, will not review findings of fact reached by the inferior Court or Tribunal even if they are erroneous.

(VENKATARAMA IYER J.)

Hari Vishnu v. *Ahmed Ishaque*, 1955 SCR 1104 : 1955 SC 233 : 1955 SCJ 267 : 1955 SCA 105 : 1955 Nag LJ 1 : 1955 (1) MLJ 157 : 1955 MWN 449.

Not to correct a mere wrong decision.

A writ of *certiorari* cannot be granted to quash the decision of an inferior court within its Jurisdiction on the ground that the decision is wrong. It must be shown before that writ is issued that the authority which passed the order acted without jurisdiction or in excess of it or in violation of the principles of natural justice. (MAHAJAN J.)

Ebrahim Aboobakar v. *Custodian General, Evacuee Property*, 1952 SC 319.

Error must be apparent on the face of the record.

It is settled that the writ of *certiorari* can be issued to correct an error of law but it should be something more than a mere error ; it must be one apparent on the face of the record. What is such an error cannot be defined precisely or exhaustively and must be left to be decided judicially on the facts of each case. (VENKATARAMA IYER J.)

Hari Vishnu v. *Ahmed Ishaque*, 1955 SCR 1104 : 1955 SC 233 : 155 SCA 105 : 1955 SCJ 267 : 1955 Nag LJ 1 : 1955 (1) MLJ 157 : 1955 MWN 449.

High Court not Court of appeal.

The writs referred to in Art. 226 are intended to be issued in grave cases where the subordinate tribunals, bodies or officers act wholly without or in excess of jurisdiction or refuse to exercise a jurisdiction vested in them or act in violation of principles of natural justice or there is an error apparent on the face of the record and such act, omission, excess or error has resulted in manifest injustice. But the High Court cannot convert itself into a Court of appeal, and examine the correctness of the decision. (CHANDRASEKHARA IYER J.)

Veerappa Pillai v. *Raman and Raman Ltd.*, 1952 SC 192 : 1952 SCR 583 : 1952 SCJ 261 : 90 CLJ 194 : BLR 1952 SC 226 : 1952 (1) MLJ 806 : 54 PLR 210 : 1952 MWN 431 : 65 LW 620 : 7 DLR SC 220 : 1952 SCA 237.

Violation of principles of natural justice.

A writ of *certiorari* may be available in cases when the tribunal in making an enquiry competent to it acts in flagrant disregard of the rules of procedure or when no particular procedure is prescribed in violation of principles of natural justice.

It may also issue to correct a manifest error apparent on the face of the proceedings *e.g.*, when it is based on clear ignorance or disregard of the provisions of law. In other words it is a patent error which can be corrected by *certiorari* but not a mere wrong decision. (MUKHERJEA J.)

T. C. Basappa v. *T. Nagappa*, 1954 SC 440 : 1955 SCR 250 : 1954 SCJ 695 : 1954 SCA 620 : (1954) Mys 235 : 67 LW 213.

Quasi-judicial authority—bias.

The fundamental principle of natural justice is that in the case of quasi-judicial proceedings the authority empowered to decide the dispute between the opposing parties should be one without bias towards one side or the other. Also a person who is interested in one party or the other should not, even formally, take part in the proceedings though in fact he does not influence the mind of the person who finally decides the case. (SUBBA RAO J.)

Gullapalli Nageswara Rao v. *Andhra Pradesh Road Transport Corporation*, 1959 SC 308 : 1959 SCJ 967 : 1959 (2) Andh WR 156.

Appeal against order.

The High Court can refuse a writ of *certiorari* if it is satisfied that there has been no failure of justice. In an appeal under Art. 133(1) (c) against such an order of refusal, the Supreme Court will not interfere unless it is satisfied that the justice of the case requires it. (BHAGWATI J.)

A. M. Allison v. *B. M. Sen*, 1957 SCR 359 : 1957 SC 227 : 1957 SCA 280 : 1957 SCJ 268 : 1956-57 (11) FJR 466 : 1957 (1) Lab LJ 472 : 1957 (1) MLJ 175.

Existence of adequate alternative remedy.

There is no rule with regard to *certiorari*, as there is with mandamus, that it will lie only when there is no equally effective remedy. It is well established that *certiorari* will lie although a right of appeal has been conferred by statute. The existence of another adequate remedy may be taken into consideration by the superior Court in arriving at a conclusion whether *certiorari* should be issued to quash the decisions of inferior courts subordinate to it. Ordinarily it will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this is only a rule of policy, convenience and discretion rather than a rule of law. Hence where the inferior Court or Tribunal acts wholly without jurisdiction or patently in excess of jurisdiction or conducts the proceedings in a manner contrary to rules of natural justice and accepted rules of procedure which offends the superior Court's sense of fair play the superior Court may issue a writ of *certiorari* to correct the error, even if an appeal to another inferior Court or tribunal was available and recourse was not had to it or if recourse was had to it and it confirmed what *ex facie* was a nullity for the reasons aforementioned. (S. R. DAS C. J.)

State of Uttar Pradesh v. *Mohammad Nooh*, 1958 SC 86 : 1958 SCR 595 : 1958 SCJ 242 : 1958 SCA 73 : (1957) 2 All 422.

Tribunal's decision of fact.

The decision of the Tribunal on a question of fact which it has jurisdiction to determine is not liable to be questioned in proceedings under Art. 226 unless it is shown to be fully unsupported by evidence. The Supreme Court also, in an appeal from the decision of the High Court should not interfere with that finding of fact. (BHAGWATI J.)

Dhrangadhara Chemical Works Ltd. v. *State of Saurashtra*, 1957 SCR 152 : 1957 SC 264 : 1957 SCA 216 : 1957 SCJ 208 : 1957 (1) Lab LJ 477.

Erroneous decision.

Where the decision of the Tribunal is in respect of a matter which lies entirely within its jurisdiction to decide and does not relate to anything collateral, an erroneous decision upon which might affect its jurisdiction and the records of the case do not disclose any error apparent on the face of the proceeding or any irregularity in the procedure adopted by it which goes contrary to principles of natural justice, the High Court cannot exercise the powers of an appellate Court and correct what it considers to be an error in the decision of the Tribunal by the issue of a writ of *certiorari*. (MUKHERJEA J.)

Parry & Co. v. *Commercial Employees Association*, 1952 SCR 519 : 1952 SC 179 : 1952 SCJ 275 : 1952 SCA 199 : 7 DLR SC 286 : BLR 1952 SC 213 : 1952 (1) MLJ 813 : 90 CLJ 7 : 1952 MWN 429 : 65 LW 491.

Power to disturb decision of inferior court on question of jurisdiction.

In *certiorari* proceedings, a court can enquire into the correctness of the decision of the inferior tribunal as to the existence of a collateral fact or fulfilment of a condition precedent upon which may depend the jurisdiction of the tribunal and may reverse that decision if it appears to it, on the materials before it, to be erroneous.

There may be tribunals, however, which, by virtue of legislation constituting them, have the powers to determine finally the preliminary facts on which the further exercise of their jurisdiction depends. With respect to them, in such cases, their decision even if wrong on facts or law cannot be corrected by a writ of *certiorari*. In cases where the fact in question is a part of the very issue which the inferior tribunal has to enquire into, a court will not issue a writ of *certiorari*, although the inferior tribunal may have arrived at an erroneous conclusion with regard to it. (IMAM J.)

Raman and Raman Ltd. v. *State of Madras*, 1956 SCR 256 : 1956 SC 463 : 1956 SCA 526 : 1956 SCJ 368 : 1956 (1) MLJ 169 : 1956 SCC 259.

Whether the power to issue a writ of *certiorari* is taken away—if it can be taken away at all under our Constitution—by the provision of an enactment making the decision of a tribunal final and incapable of being challenged in a court of law or not, the Superior Court is not absolutely deprived of the power to issue a writ on the ground of either manifest defect in the jurisdiction of the tribunal or a manifest fraud in the party procuring the order. (MUKHERJEA J.)

Parry & Co. Ltd. v. *Commercial Employees Association*, 1952 SCR 519 : 1952 SCJ 275 : BLR 1952 SC 213 : 1952 (1) MLJ 813 : 90 CLJ 7 : 1952 MWN 429 : 65 LW 491 : 7 DLR SC 286 : 1952 SCA 299 : 1952 SC 179.

Duty of inferior Court.

When a superior Court issues a rule on an application for *certiorari* it is incumbent on the inferior Court or the quasi-judicial body to whom the rule is addressed to produce the entire records before the Court along with its return. (S. R. DAS J.)

Ghaio Mal v. *State of Delhi*, 1959 SCR 1424 : 1959 SC 65 : (1959) Punj 277 : 1959 SCJ 105.

Arts. 226 and 227—extent of powers.

The powers of judicial interference under Art. 227 with orders of judicial or quasi-judicial nature are not greater than the powers under Art. 226. Under Art. 226 the power may extend to quashing an impugned order on the ground of mistake apparent on the face of the record. But under Art. 227 the power is limited to seeing that the tribunal functions within the limits of its authority. (SINHA J.)

Nagendra Nath Bora v. *Commissioner of Hill Division*, 1958 SCR 1240 : 1958 SC 398 : 1958 SCJ 798 : 1958 SCA 572.

When a special Act has created its own hierarchy of officers and appellate authorities to administer the law, so long as those authorities function within the letter and spirit of the law, the High Court has no concern with the manner in which those powers have been exercised.

Where the appellate authority has unlimited jurisdiction to examine and appreciate the evidence in the exercise of its appellate or revisional jurisdiction and it has not been shown that in exercising its powers, it has disregarded any mandatory provisions of the law and has only failed to carry out certain executive instructions, the non-observance of those instructions cannot affect the validity of the order passed by it and in such a case the High Court will not be justified in interfering either under Art. 226 or Art. 227. (B. P. SINHA J.)

Nagendra Nath Bora v. *Commissioner of Hill Division*, (*ibid.*).

Art. 227—whether confers only administrative superintendence.

The contention that Art. 227 confers on the High Courts powers only of administrative superintendence and no judicial superintendence over subordinate courts and Tribunals cannot be accepted.

1952 All 163 Approved. (S. R. DAS J.)

Waryan Singh v. *Amarnath*, 1954 SC 215 : 1954 SCR 565 : 1954 SCJ 290 : 1954 SCA 334 : 9 DLR SC 273 : 1954 MWN 424.

Scope.

While in a *certiorari* under Art. 226, the High Court can only annul the decision of a tribunal it can under Art. 227 do that and also issue further directions. (VENKATARAMA IYER J.)

Hari Vishnu v. *Ahmad Ishaque*, 1955 SCR 1104 : 1955 SC 233 : 1955 SCA 105 : 1955 SCJ 267 : 1955 Nag LJ 1 : 1955 (1) MLJ 157 ; 1955 MWN 449 : 1955 All WR 339 : 1955 Andh LT (Civil) 350.

Tribunal—Rent Controller under E. Punjab Rent Act.

The Rent Controller and the District Judge exercising jurisdiction under the East Punjab Urban Rent Restriction Act, 1949 are certainly Tribunals, if not Courts, within the meaning of Art. 227. (S. R. DAS J.)

Waryan Singh v. *Amarnath*, 1954 SC 215 : 1954 SCR 565 : 1954 SCJ 290 : 1954 SCA 334 : 9 DLR SC 273 : 1954 MWN 424.

Power when to be exercised.

This power of superintendence is to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within bounds of their authority and not for correcting mere errors. (S. R. DAS J.)

Waryan Singh v. *Amarnath*, (*ibid.*).

Error apparent on the face of the record.

Under Art. 227 the High Court cannot assume appellate powers to correct every mistake of law. An error of law which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record and such an error cannot be cured by an issue of *certiorari*.

The Bombay Revenue Tribunal dismissed, on appeal, an application by a landlord for possession of land under the Bombay Tenancy and Agricultural Lands Act, 1948 on the ground that the tenant was in arrears of rent for three consecutive years, holding that the landlord had failed to terminate the tenancy by giving a notice before proceeding in ejectment. The High Court issued a writ of *certiorari* quashing the order of the tribunal on the ground that it had committed an error, which was apparent on the face of the record, in holding that an order for possession could not be made unless a previous notice had been given terminating the tenancy.

Held, there was no error apparent on the face of the record capable of being corrected by a writ of *certiorari*.

1953 Bom 207 Reversed. (K. C. DAS GUPTA J.)

Satyanaryan Laxminarayan Hegde v. *Mallikarjun Bhavanappa*, 1960 (1) SCR 890 : 1960 SC 137 : 1960 SCJ 1065 : 62 Bom LR 146.

Art. 229(1)—Member of the High Court Staff—Chief Justice's power to remove.

There can be no doubt that as from the commencement of the Government of India Act, 1935, the power of dismissal of a member of the High Court staff, including the Registrar of the original side, would vest in the Chief Justice. This would be so even apart from the normal implication of the power of appointment specifically recognised under the Act. The Constitution has made no change in this respect.

Pradyat Kumar Bose v. *Hon'ble Chief Justice, Calcutta High Court*, 1955 (2) SCR 1331 : 1956 SC 285 : 1956 SCA 79 : 1956 SCJ 259 : 1956 SCC 402.

Whether the Chief Justice can delegate the power of enquiry.

The exercise of the power to appoint or dismiss an officer is the exercise not of a judicial power but of an administrative power. It is nonetheless so, by reason of the fact that an opportunity to show cause and an enquiry simulating judicial standard have to precede the exercise thereof. It is well recognised that a statutory functionary exercising such a power cannot be said to have delegated his functions merely by deputing a responsible and competent official to enquire and report. That is the ordinary mode of exercise of any administrative power. What cannot be delegated except where the law specifically so provides, is the ultimate responsibility for the exercise of such power. Hence it is competent to the Chief Justice to delegate to another Judge the enquiry into a charge against a member of the High Court staff. (JAGANNADHADAS J.)

Pradyat Kumar Bose v. *Hon'ble Chief Justice, Calcutta High Court*, (*ibid*).

Art. 232(2)—Advocate of the Lahore High Court.

The effect of cl. 6(2) of the High Court (Punjab) Order, 1947 is that the seniority of an advocate of the Lahore High Court who was recognised as an advocate entitled to practise in the East Punjab High Court is to be counted on the strength of his standing in the Lahore High Court. That seniority was not lost but preserved by the Bar Councils Act which came into force in the province

in 1948. There is no reason why for the purpose of Art. 233 such an advocate should not have the same standing as he has in the East Punjab High Court where he is practising. As cl. (2) does not say how that standing must be reckoned. an advocate of the Punjab High Court is entitled to count the period of his practice in the Lahore High Court for determining his eligibility for appointment as a District Judge. (S. K. DAS J.)

Rameshwar Dayal v. *State of Punjab*, 1961 SC 816.

Art. 233(2).

In the case of advocates of the Lahore High Court even though their names are not factually on the roll of Advocates of the Punjab High Court the requirements of Art. 233(2) would be fulfilled if they had the necessary standing of seven years. For under cl. 6 of the High Court (Punjab) Order, 1947, they were recognised as advocates entitled to practise in the High Court of Punjab till the Bar Councils Act, 1926 came into force in East Punjab and under S. 8(2) (a) of that Act it was the duty of that High Court to prepare and maintain a roll of advocates in which their names should have been entered on the day on which S. 8 came into force, i.e., on 28.9.48 and therefore those advocates automatically came on the roll of advocates of the Punjab High Court and had only to pay a fee of Rs. 10 to the Bar Council. (S. K. DAS J.)

(*Ibid*).

Art. 245—Legislative power—Delegation.

It is well established that the power of delegation is a constituent element of the legislative power as a whole, and that in modern times when the Legislatures enact laws to meet the challenge of the complex socio-economic problems, they often find it convenient and necessary to delegate subsidiary or ancillary powers to delegates of their choice for carrying out the policy laid down by their Acts. The Legislature cannot delegate its essential function in any case. It must lay down the legislative policy and principle and must afford guidance for carrying out the said policy before it delegates its subsidiary powers in that behalf.

In dealing with the vires of any statute on the ground of excessive delegation, it is necessary to enquire whether the impugned delegation involves the delegation of an essential legislative function or power and whether the Legislature has enunciated its policy and principle and given guidance to the delegate or not.

1955 (1) SCR 380 Relied on.

Vasanlal Maganbhai v. *State of Bombay*, 1961 SC 4.

Art. 246, Schedule 7, List 3—Entry 21 & Entry 35—Motor Vehicles Act.

Chapter IVA, Motor Vehicles Act, 1939, is not *ultra vires* the powers of Parliament.

1960 SC 1073 Followed.

Kondala Rao v. *A. P., S. R. T. Corpn.*, 1961 SC 82.

Art. 254 (2)—powers of Parliament.

Under the Constitution Parliament can, acting under the proviso to Art. 254 (2), do what the Central Legislature could not under S. 107 (2) of the Government of India Act 1935, *viz.*, repeal a State law. But even where it does not expressly

do so, the State law will be void under that provision if it conflicts with a later "law with respect to the same matter" that may be enacted by Parliament.

1953 Bombay 371 Affirmed. (VENKATARAMA IYER J.)

Zaverbhai Amaidas v. *State of Bombay*, 1954 SC 752 : 1955 SCR 799 : 1954 SCJ 851 : 1954 SCA 1295 : 57 Bom LR 589 : 1955 All WR 1.

Art. 286—use of American decisions.

Much help cannot be derived from American decisions on the commerce clause and the import-export clause in the solution of problems arising under Art. 286 (1) (b). (PATANJALI SASTRI C. J.)

State of Travancore-Cochin v. *Bombay Company Ltd.*, 1952 SC 366 : 1952 SCR 1122 : 1952 SCJ 527 : 1953 (1) MLJ 1 : 65 LW 1087 : 1952 SCA 656 : 1 BLJ 94 : 1952 STC 434 : 1952 KLT 581.

Art. 299.

It is well settled that Governments can only be bound by contracts that are entered into in a particular way and which are signed by the proper authority. (BOSE J.)

Thawardas v. *Union of India*, 1955 (2) SCR 48 : 1955 SC 468 : 1955 SCA 862 : 1955 SCJ 445 : 1955 (2) MLJ 23 : 57 Pun LR 369 : 34 Pat 359 : 1955 MWN 782.

Arts. 301 and 304 (h)—taxation laws—validity test—Assam Act 13 of 1954.

The Assam Taxation (on Goods carried by Roads or Inland Waterways) Act of 1954 has not complied with the provisions of Art. 304 (h) and must be declared to be void.

1955 Assam 249 Reversed.

Atiabari Tea Co. Ltd. v. *State of Assam*, 1961 SC 232.

Art. 310 (1) and Art. 311.

The English Common Law Rule that public servants hold office only during the pleasure of the Crown has not been adopted in its entirety in the Constitution with all its rigorous implications. In other words the provisions of Art. 311 operate as a proviso to Art. 310 (1).

1954 SCR 786 Referred to. (S. R. DAS C.J.)

Parshottam L. Dhingra v. *Union of India*, 1958 SCR 828 : 1958 SC 36 : 1958 SCJ 217 : 1958 SCA 37 : (1958) Punj 611 : 1958 ALJ 372 : 1958 (1) Lab LJ 544.

Art. 311—suit for arrears of salary.

The rule of English law that a civil servant cannot maintain a suit against the State or against the Crown for the recovery of arrears of salary does not prevail in India and has been negatived by statutory provisions.

1947 FCR 89 Relied on ; 1950 Patna 17 Affirmed. (MAHAJAN J.)

State of Bihar v. *Abdul Majid*, 1954 SC 245 : 1954 SCR 786 : 1954 SCJ 300 : 1954 SCA 226 : 9 DLR SC 266 : 1954 ALJ 280 : 67 LW 550 : 1954 MBLJ SC 38 : 2 BLJ 183 : (1954) Pat 266.

A Government servant who is dismissed illegally from service has a right to institute a suit for recovery of arrears of salary.

1954 SCR 786 Followed ; 1951 All 205 Reversed. (IMAM J.)

Om Prakash Gupta v. *State of Uttar Pradesh*, 1955 (2) SCR 391 : 1955 SC 600 : 1955 SCA 832 : 1955 SCJ 640 : (1956) (1) All 131 : 1955 MWN 930 : 1955 (1) Lab LJ I : 1955 (2) MLJ 136 : 1955 All WR 511 : 1955 BLJR 550 : 1955 ALJ 617.

Art. 311(1) and Railway Establishment Code Vol. I (1951 Edn.), Rule 1705(c).

The provisions cannot be read as implying that the removal must be by the very same authority who made the appointment or by his direct superior. It is enough that the removing authority is of the same rank or grade.
(JAGANNADHADAS J.)

Mahesh Prasad v. *State of U. P.*, 1955 SCR 96 : 1955 SC 70 : 1955 SCA 65 : 1955 SCJ 153 : 1955 Cri LJ 249 : 1955 BLJR 98 : 1955 All WR 245 : 1955 ALJ 87 : 1955 Andh WR 83 : 1955 (1) MLJ 83 : 1955 MWN 240 : 1955 Andh LT (Cri) 166.

Applicability to Police forces.

By the Constitution of India the distinction between Police officers and other civil servants by S. 243 of the Government of India Act, 1935, in the matter of protection by Constitutional guarantees is abolished and as from 26.1.1950 the recruitment and conditions of service of all persons serving the Union or the State are now governed by Art. 309 and their tenure by Art. 310. By Art. 311 the protection granted by S. 240(2) and (3) of the Government of India Act, 1935 is extended to members of the Police force as well. (SHAH J.)

Jagannath Prasad Sarma v. *State of Uttar Pradesh*, 1961 SC 1245.

Contracts of temporary employment.

Art. 311 has no application to temporary appointments under a contract. Hence where a Government servant, who had been employed temporarily under a contract for a specified term, is continued, after the expiry of the term, in service on a temporary basis under a new contract and his services are terminated after due notice under the new contract the article has no application, for the State can enter into contracts of temporary employment and impose special terms in each case, provided they are not inconsistent with the Constitution, and those who choose to accept those terms and enter into the contract are bound by them even as the State is bound. (BOSE J.)

Satish Chandra Anand v. *Union of India*, 1953 SC 250 : 1953 SCR 655 : 1953 SCJ 323 : 1953 SCA 293 : 1953 MWN 615.

Permanent and temporary posts.

Articles 311 and 310 do not make any distinction between Government servants who are employed in permanent posts and those who are employed in temporary posts.

(1955) Nag. 893, 1957 Punj 42, 1957 Punj 191 and 1957 Raj 81 Overruled.
(S. R. DAS C. J.)

Parshottam L. Dhingra v. *Union of India*, 1958 SCR 828 : 1958 SC 36 : 1958 SCJ 217 : 1958 SCA 37 : (1958) Punj 611 : 1958 ALJ 372 : 1958 (1) Lab LJ 544.

Temporary Government servants.

If the termination of service is founded on the right flowing from contract or service rules, then *prima facie*, the termination is not a punishment and carries with it no evil consequences and so Art. 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed, it may, nevertheless, choose to punish the servant and if the termination is sought to be founded upon misconduct or the like then it is a punishment and Art. 311 must be complied with. A reduction in rank likewise may be by way of punishment or it may be an innocuous thing. For determining whether a reduction in rank is or is not by way of punishment attracting Art. 311, the Court has to apply two tests, namely, (1) whether the servant had the right to the post or the rank, or (2) whether he has been visited with penal consequences, such as forefeiture of pay or allowances or loss of seniority in the substantive rank or stoppage or postponement of future chance of promotion. If the case satisfies either of the two tests, then it must be held that the servant has been punished and if the requirements of the rules and Art. 311 have not been complied with, the termination of service or reduction in rank is wrongful and in violation of the Constitutional right. (S. R. DAS C. J.)

Parshottam L. Dhingra v. *Union of India*, (*ibid*).

Probationer.

In the case of a probationer, if the Government comes to the conclusion that he is not a fit and proper person to hold a post in the public service of the State, it can discharge him without holding any enquiry into his alleged misconduct. If it proceeds against him in that direct way, without casting an aspersion on his honesty or competence, his discharge will not in law have the effect of a removal from service by way of punishment. But if the Government chooses the more difficult course of starting proceedings against him and of branding him as a dishonest and incompetent officer, he will have a right, in those circumstances, to insist upon the protection of Art. 311 (2). (SINHA C. J.)

State of Bihar v. *Gopi Kishore Prasad*, 1960 SC 689 : 1960 (1) Lab LJ 577 : 1960 BLJR 220.

Discharge of a probationer.

Mere termination of employment does not carry with it 'any evil consequences' such as forefeiture of pay or allowances, loss of seniority, stoppage or postponement of future chances of promotion etc.

An order discharging a public servant, even if a probationer, in an enquiry on charges of misconduct, negligence, inefficiency or other disqualification, may appropriately be regarded as one by way of punishment. But an order discharging a probationer following upon an enquiry to ascertain whether he was fit to be confirmed, is not of that nature and to such a case Art. 311 (2) does not apply.

(1958) Cut 77 Reversed.

State of Orissa v. *Ram Narayan*, 1961 SC 177.

Compulsory retirement.

An order of compulsory retirement does not amount to dismissal or removal and therefore does not attract the provisions of Art. 311. (S. R. DAS J.)

Shyamlal v. *State of Uttar Pradesh*, 1954 SC 369 : 1954 (1) MLJ 730 : 1955 SCR 26 : 1954 SCJ 493 : 1954 SCA 476 : 1954 ALJ 324.

Bombay Civil Services Rules (as adopted in Saurashtra), R. 165-A—validity.

Rule 165-A of the Bombay Civil Services Rules is not violative of Art. 311(2). Hence an order compulsorily retiring a person who has completed the age of 50 years without holding an enquiry is not invalid.

1954 Saurashtra 146 Reversed. (VENKATARAMA IYER J.)

State of Saurashtra v. *Saubhagchand*, 1957 SC 892 : 1958 SCA 5 : 1957 SCJ 161.

Patiala State Regulations, Rule 278.

An order of compulsory retirement made against a civil servant under Rule 278 of the Patiala State Regulations is not a removal from service within the meaning of Art. 311(2). (DAS GUPTA J.)

Dalip Singh v. *State of Punjab*, 1960 SC 1305.

The ruler of Wadhwan State (which later became part of the State of Saurashtra) promulgated a *Dhara* (Act) fixing the age of superannuation of civil servants at 60. After the Ruler of the Wadhwan State made over the administration of the State to the Saurashtra Government the latter compulsorily retired a civil servant who had completed the age of 55. *Held*, the order compulsorily retiring was wrongful, for even though tenure of office of the civil servant was initially during the pleasure of the Ruler, the Ruler put a fetter upon his powers by enacting the *Dhara* and this obligation of the Ruler passed to the Saurashtra Government and therefore it could order compulsory retirement only on payment of reasonable compensation.

1952 Saurashtra 49 (FB) Reversed. (BHAGWATI J.)

Bholanath J. Thaker v. *State of Saurashtra*, 1954 SC 680.

Pension.

Article 311 (2) does not deal with the question of pension at all. (WANCHOO J.)

Narasimhachar v. *State of Mysore*, 1960 SC 247 : 1960 (1) SCR 981 : 1960 SCJ 516.

Suspension.

An order of suspension made against a Government servant pending an enquiry is not a penalty imposed after enquiry ; with the order of dismissal passed as a result of the enquiry the order of suspension lapses. Therefore the subsequent declaration by a Civil Court that the dismissal was illegal cannot revive the order of suspension which does not exist. (IMAM J.)

Om Prakash Gupta v. *State of Uttar Pradesh*, 1955 (2) SCR 391 : 1955 SC 600 : 1955 SCA 832 : 1955 SCJ 640 : (1956) 1 All 131 : 1955 MWN 930 : 1955 (1) Lab LJ 1 : 1955 (2) MLJ 136 : 1955 All WR 511 : 1955 BL JR 550 : 1955 ALJ 617.

Reasonable opportunity.

The reasonable opportunity envisaged by clause (2) includes :—
(a) an opportunity to deny his guilt and establish his innocence which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based ;

(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence ; and

(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the Government servant tentatively proposes to inflict one of the three punishments and communicates the same to the Government servant.

1954 FCR 103 Not Approved. (S. R. DAS C. J.)

Khemchand v. *Union of India*, 1958 SC 300 : 1958 SCR 1080 : 1958 SCJ 497 : 1958 SCJ 222 : (1958) Punj 1062 : 1958 (1) MLJ 169 : 1958 All WR 118.

Under the Article a proper opportunity must be afforded to the public servant at the stage of the enquiry after the charge is supplied to him as well as at the second stage when punishment is about to be imposed. If the first enquiry was materially defective and denied him an opportunity to prove his case it is impossible to hold that the reasonable opportunity guaranteed by Art. 311(2) has been afforded to the public servant. (GAJENDRAGADKAR J.)

State of Madhya Pradesh v. *Chintaman S. Waishampayan*, 1961 SC 1623.

Non-supply of relevant documents.

In a case falling under Art. 311(2), it will be idle to contend that the infirmities on which a public servant relies flow from the exercise of the discretion vested in the officer holding the enquiry. The enquiry officer may have acted bonafide but that does not mean that the discretionary orders passed by him are final and conclusive. It would be open to the High Court exercising jurisdiction under Art. 226 to examine the matter and decide whether the requirements of Art. 311 (2) have been satisfied or not. Where it appears that the effective exercise of the reasonable right of cross-examining witnesses giving evidence against the public servant is prevented by the enquiry officer by not giving to the public servant relevant documents to which he is entitled, that would inevitably be that the enquiry has not been held in accordance with rules of natural justice and Art. 311 (2) would have been violated. (GAJENDRAGADKAR J.)

(*ibid.*)

Departmental enquiry—necessity.

It is of the utmost importance that in taking disciplinary action aginst a public servant a proper departmental enquiry must be held against him after supplying him with a charge sheet and he must be allowed a reasonable opportunity to meet the allegations contained in the charge sheet. The departmental enquiry is not an empty formality ; it is a serious proceeding intended to give the officer concerned a chance to meet the charge and prove his innocence. Hence in the absence of an enquiry it will not be fair to strain facts against him and to hold that in view of the admissions made by him in certain other proceedings, the enquiry would have served no useful purpose.

1957 Madh Bharat 15 Reversed. (GAJENDRAGADKAR J.)

Jagdish Prasad Saxena v. *State of Madhya Bharat*, 1961 SC 1070.

Enquiry under more "drastic" rules.

When two sets of rules, viz., the Disciplinary Proceedings (Administrative

Tribunal) Rules, 1951 and the Bihar and Orissa Subordinate Services Discipline and Appeal Rules were in operation at the time when the enquiry was directed againt a public servant and the Government directed the enquiry under the former which were more "drastic" and prejudicial to the interests of the public servant, *held*, it was a clear case of discrimination and the order directing the enquiry and the subsequent proceedings were liable to be struck down as infringing Art. 14 of the Constitution.

1958 Orissa 96 Affirmed. (SHAH J.)

State of Orissa v. *Dhirendranath Das*, 1961 SC 1715.

Notice—mention of all 3 punishments.

It cannot be contended that where the show cause notice states all the three punishments mentioned in Art. 311(2), the notice does not comply with the essential requirements of the Article inasmuch as it does not particularise the actual or exact punishment proposed to be imposed on the Government servant. (S. K. DAS J.)

Hukumchand v. *Union of India*, 1959 SC 536 : 1959 SCJ 419 : 1959 SCA 346 : 1959(1) MLJ 148 :

Art. 320(3) (c)—whether justiciable.

The provisions of Art. 320(3) (c) are not mandatory and non-compliance with those provisions does not afford a cause of action to a Government servant in a court of law. (SINHA J.)

State of Uttar Pradesh v. *Manbodhanlal Srivatsava*, 1958 SCR 533 : 1957 SC 912 : 1957 SCA 1022 : 1958 SCJ 150 : 1957 All WR 710 : 1957 MPC 744 : 1957 ALJ 921 : 1958 MLJ 85 (Cr.).

Art. 320 does not mean that the State should consult the Public Service Commission as many times as the Government servant against whom disciplinary action is taken, may choose to file review petitions. (MAHAJAN C. J.)

P. Joseph John v. *State of Travancore-Cochin*, 1955 SCR 1011 : 1955 SC 160 : 1955 SCA 85 : 1955 SCJ 221 : 1955 And WR 134 : 1955 (1) MLJ 134 : 1955 KLT 351 : 1956(1) Lab. LJ 235.

Dismissal of a member of the High Court staff—whether consultation is necessary.

The officers and staff of a High Court cannot be said to fall within the scope of the phrase 'a person serving under the Government of India or the Government of a State in a civil capacity' because in respect of them the administrative control is clearly vested in the Chief Justice who under Art 229 has the power of appointment and removal and of making rules for the conditions of service. Prior consultation with the Public Service Commission is not necessary for the dismissal of a member of the High Court staff. (JAGANNADHADAS J.)

Pradyat Kumar Bose v. *Hon'ble Chief Justice, Calcutta High Court*, 1955(2) SCR 1331 : 1956 SC 285 : 1956 SCA 79 : 1956 SCJ 259 : 1956 SCC 402.

Review petition.

An application for review by a civil servant would be covered by the words "memorials or petitions". (SINHA J.)

State of U.P. v. *Manbodhanlal Srivatsava*, 1958 SCR 533 : 1957 SC 912 :

1957 SCA 1022 : 1958 SCJ 150 : 1957 All WR 710 : 1957 MPC 744 : 1957 ALJ 921 : 1958 MLJ 85(Cr.).

Art. 372—regulation or order.

There is no material difference between "an existing law" and "a law in force". The words "laws in force" as used in Art. 372 are wide enough to include not merely a legislative enactment but also any regulation or order which has the force of law. But an order must be a legislative and not an executive order before it can come within the definition of law. (MUKHERJEA J.)

Edward Mills Ltd. v. *State of Ajmer*, 1955 SCR 735 : 1955 SC 25 : 1955 SCA 24 : 1955 SCJ 42 : 1955(1) MLJ 1.

Arts. 372 and 366(10)—Orders of Maharaja of Gwalior.

The *Kalambandis* of 1912 A.D. and 1935 A.D. issued by the Ruler of Gwalior had the force of law and would amount to an existing law under Art. 372. The right guaranteed to a citizen by the *Kalambandis* cannot be extinguished by the executive order of the Government of Madhya Bharat.

1953 Madh Bh 257(FB) Reversed. (GAJENDRAGADKAR J.)

Madhaorao v. *State of Madhya Bharat*, 1961 SC 298.

SEVENTH SCHEDULE : **List I, item (33) ; List II, item (36) ; List III, item (49).**

Reading the three items together, it is fairly obvious that the categories of 'purpose' contemplated are three in number, namely, Union purpose, State purpose and any other public purpose. Acquisition of sites for the building of hospitals, or educational institutions by private benefactors will be a public purpose, though it will not strictly be a State or Union purpose.

Cases where the State acquires or requisitions property to facilitate the coming into existence of utilitarian institutions, or schemes having public welfare at heart, will fall within the third category. (CHANDRASEKHARA IYER J.)

State of Bombay v. *Ali Gulshan*, 1955(2) SCR 867 : 1955 SC 810 : 1956 SCA 17 : 1955 SCJ 822 : 58 Bom LR 490 : 1956 SCC 117.

List II, Entry 62—Punjab Act 7 of 1951.

The Punjab Forward Contracts Act (7 of 1951) to tax forward contracts as defined does not come within entry 62. If the Act provides for a tax on betting and gambling, then and then only it can come within item 62.

B. & G. Exchange Ltd. v. *State of Punjab*, 1961 SC 268.

List III, Entry 7—Punjab Act 7 of 1951.

The Punjab Forward Contracts Act (7 of 1951) cannot fall within entry 7 of Concurrent List of Sch. 7.

(*ibid.*)

Constitution (First Amendment) Act, 1951—validity.

The Constitution (First Amendment) Act, 1951 passed by the provisional Parliament is not *ultra vires*. (PATANJALI SASTRI J.)

Shankari Prasad Singh Deo v. *Union of India*, 1951 SC 458 : 1952 SCR 89 ;

1951 SCJ 775 : 1951 ALJ 740 : 1951(2) MLJ 683 : 64 LW 1005 : 88 CLJ 281 : 30 Pat 1176.

CONTEMPT OF COURT.

Object of proceedings.

The object of contempt proceedings is not to afford protection to judges personally from imputations to which they may be exposed as individuals. It is intended to be a protection to the public whose interests would be very much affected if by the act or conduct of any party, the authority of the Court is lowered and the sense of confidence which people have in the administration of justice by it is weakened. (MUKHERJEA J.)

Brahma Prakash Sarma v. *State of Uttar Pradesh*, 1954 SC 10 : 1953 SCR 1169 : 1953 SCJ 521 : 1953(2) MLJ 231 : 1953 SCA 624 : 1953 MWN 656 : 1953 ALJ 571 : 1953 BLJR 600 : 1954 Cr LJ 238.

The purpose of the Court's action in contempt is a practical purpose and it is reasonably clear that the Court will not exercise its jurisdiction upon a mere question of propriety. Hence the jurisdiction is not to be invoked unless there is a real prejudice which can be regarded as a substantial interference with the due course of justice.

58 Cal 884 Approved. (MAHAJAN J.)

Rizwan-ul-Hasan v. *State of Uttar Pradesh*, 1953 SC 185 : 1953 SCR 581 : 1953 SCJ 255 : 1953 SCA 546 : 8 DLR SC 260 : 1953 AWR 351 : 66 LW 429 : 1953 MWN 491 : 1954 Cr LJ 911.

Disobedience of orders of Superior Court.

Before a subordinate court can be found guilty of disobeying the order of the Superior Court and thus to have committed contempt, it is necessary to show that the disobedience was intentional. There is no room for inferring such an intention unless the person charged had knowledge of the order. If what a subordinate court has done is in utter ignorance of the order of the Superior Court, it will clearly not amount to intentional disobedience. There may perhaps be a case where an order disobeyed can reasonably be construed in two ways and the subordinate court construed it in one of those ways but in a way different from that intended by the Superior Court. There may also be cases where disobedience is accidental. In such cases there would be no contempt.

While orders had been reserved by a Sub-Divisional Magistrate on an application for redelivery against one G who had been previously put in possession by an order under S. 522 Cr. P.C. an application was filed before the Magistrate stating that the opposite party (G) had moved the High Court and stay of further proceedings in the matter had been ordered by the High Court. It was not clear as to who was the person who signed the application. It was not countersigned by a pleader nor was it presented to the court by a pleader authorised to appear for G. Along with the application was, however, filed a telegram addressed to a local pleader reading "G's case further proceedings stayed, RAM". It did not appear that the pleader was appearing for G in the proceedings before the Magistrate. There was nothing to indicate who the sender of the telegram was nor was it suggested that Ram was the advocate appearing for G in the High Court. No affidavit was filed along with the application. The Magistrate refused to act on the telegram and pronounced orders allowing the application against G.

Held, the Magistrate's refusal to act on the telegram did not amount to contempt as it was clear that there was no intention on the part of the Magistrate to disobey the order of the High Court.

Held further, what was necessary to establish in a case of this kind was that the subordinate court knew the order of the Superior Court and knowing the order, it disobeyed the order. The knowledge, however, must be obtained from a source which is either authorised or otherwise authentic. Had the telegram been received from the (superior) Court or from an advocate appearing for G before the High Court and addressed either to the (subordinate) Court or pleader for G, it may have been possible to take the view that the information contained therein the stamp of authority, though it cannot be laid down that every telegram purporting to be signed by an advocate or pleader is *per se* guarantee of the truth of the matters stated therein and also of the fact that it was actually sent by the person whose name it bears and an affidavit from the party would be necessary in order to assure the court about these matters. (MUDHOLKAR J.)

B. K. Kar v. *Chief Justice and Companion Judges of the Orissa High Court*, 1961 SC 1367.

Failure to carry out orders.

The High Court sent a copy of an order directing the release forthwith of a detenue to the District Magistrate. It was received in the office when he was on tour. There was delay in communicating it to the jail authorities and consequently the prisoner was released only 8 days later. The District Magistrate who was proceeded against in contempt pleaded that the delay was due to the inexperience of the clerks in the office. *Held*, the fact that he was not aware of the order of the Court and was on tour must be regarded as a good defence in a contempt proceeding. *Held* also, the absence of intention to flout or disobey the order of the High Court must be regarded as an important circumstance in his favour and that in law, the District Magistrate was not guilty of contempt. (FAZL ALI J.)

H. P. Singh v. *Thakur Prasad Tewari*, 1953 SC 436 : 31 Pat 182 : 1954 Cr LJ 1837.

Interfering with the course of justice.

While proceedings under S. 145 Criminal Procedure Code were pending before a Sub-Divisional Magistrate, the opposite parties in the proceedings filed an application before the District Magistrate in the nature of a counter complaint making allegations against a person alleged to be the real person behind the scene and the District Magistrate forwarded it to the Sub-Divisional Magistrate for report,

Held, the District Magistrate was under a duty to supervise the work of the Sub-Divisional Magistrate and the application was transmitted for report in the usual and normal course of official practice and hence the action of the District Magistrate cannot be characterised as having a tendency to interfere with the course of justice. The view that only extracts of the application should have been forwarded for report and not the application as such, cannot be subscribed to.

(Conviction of the District Magistrate for contempt of the Court of the Sub-Divisional Magistrate quashed). (MAHAJAN J.)

Rizwan-ul-Hasan v. *State of Uttar Pradesh*, 1953 SC 185 : 1953 SCR 581 : 1953 SCJ 255 : 1953 SCA 546 : 8 DLR SC 260 : 1953 AWR 351 : 66 LW 429 : 1953 MWN 491 : 54 CrLJ 911.

While proceedings were pending before a Sub-Divisional Magistrate an application containing allegations against him was filed before the District Magistrate who forwarded it to the Sub-Divisional Magistrate for report. On

receipt of the report the District Magistrate, being satisfied about the baselessness of the allegations, did not think it necessary to withdraw the case from the file of the Sub-Divisional Magistrate.

Held, as under S. 528 of the Cr. Pr. C. the District Magistrate had authority to withdraw the case he was entitled to use the powers under that section if the allegations against the Sub-Divisional Magistrate contained in the application were substantiated. The action on the part of the District Magistrate in sending the application to the Magistrate concerned for his remarks, done in the usual and normal course of the discharge of his duties cannot be held to interfere with the course of administration of justice. The view that only extracts from the application should have been forwarded and not the application as such cannot be subscribed to.

(Conviction of the District Magistrate for contempt of the Sub-Divisional Magistrate quashed.) (MAHAJAN J.)

Rizwan-ul-Hasan v. *State of Uttar Pradesh*, (*ibid.*).

The contemner was the petitioner in an application under Art. 32 of the Constitution, before the Supreme Court. When the petition was being heard, he distributed in the Court premises a leaflet containing, *inter alia*, the following passage written by him :—"The public has full and firm faith in the Supreme Court, but sources that are in the know say that the Government acts with partiality in the matter of appointment of those Hon'ble Judges as Ambassadors, Governors, High Commissioners etc., who give judgments against Government but this has so far not made any difference in the firmness and justice of the Hon'ble Judges".

Held, the object of the writer was quite clearly to affect the minds of the judges and deflect them from the strict performance of their duties. The publication certainly tended to hinder or obstruct the due administration of justice and was a contempt of Court.

Held, further, there was also in the leaflet a strong denunciation of the State Government which was a party to the writ petition regarding matters under consideration of the Court, and that it was not fair comment on the proceedings but an attempt to prejudice the Court against the State and to stir up public feeling on the very question and that therefore the publication was a clear contempt of Court.

Held also, that it was a fit case where the power to punish contempt should be exercised and that it was necessary to impose a punishment of imprisonment. (S. R. DAS J.)

Hiralal Dixit v. *State of U. P.*, 1954 SC 743 : 1955(1) SCR 677 : 1954 SCJ 846 : 1954 SCA 1263 : 1955 AWR 1 : 1954(2) MLJ 720 : 68 LW3 :1955 MWN 34 : 1955 MWN Cr. 22.

Interference with administration of justice—direction by Government official.

The Under Secretary to Government sent a circular to the District Magistrates of the State giving a direction to them to ignore a decision of the State High Court which was binding on them and to follow a certain procedure, which had been held to be invalid, till the matter was carried to the High Court in some case.

Held, the direction was a flagrant interference with the administration of justice by Courts and amounted to a clear contempt of Court.

(1958) Cutt 496 Affirmed. (MUDHOLKAR J.)

Dibakar Satpathy v. *Chief Justice and Companion Judges of the Orissa High Court*, 1961 SC 1315.

Conducting parallel enquiry into matter *sub judice*.

It will be mischievous for a newspaper systematically to conduct an investigation into a crime for which a man has been arrested and to publish the results

of that investigation, because such action on the part of the newspaper tends to interfere with the course of justice whether the investigation tends to prejudice the accused or the prosecution.

But in a case where the Special Committee of a City Corporation had embarked upon an enquiry on the directions of the Corporation in order to discover malpractices on the part of a servant of the Corporation including making unworthy appointments where it is alleged that the motive for such appointments is to suborn prosecution witnesses in a criminal case against the Corporation servant which proceeding is pending before the High Court and in which proceeding one of the questions to be decided is whether the Corporation servant has so suborned witnesses, the ascertainment of motive for the appointments will be merely incidental to the main purpose of the enquiry and it will be difficult to conclude therefrom that the Committee were holding a parallel enquiry on matters pending decision by a Court of law and thereby their action amounted to contempt of court as tending to interfere with the course of justice. (IMAM J.)

Saibal Kumar Gupta v. *B. K. Sen*, 1961 SC 633.

Scandalizing Court—Considerations.

The "Scandalizing Court" might manifest itself in various ways but in substance it is an attack on individual judges or the Court as a whole with or without reference to particular cases casting unwarranted and defamatory aspersions upon the character or ability of the judges. Such cases are fortunately rare and require to be treated with much discretion. The summary jurisdiction by way of contempt proceedings has to be exercised with scrupulous care and only when the case is clear and beyond reasonable doubt.

There are two primary considerations which should weigh with the Court in such cases. First, the reflection on the conduct or character of a judge in reference to the discharge of his judicial duties will not be contempt if made in the exercise of the right of fair and reasonable criticism. Secondly, care should be taken to distinguish between what is libel on the judge and what amounts really tocontempt. A defamatory attack on a judge may be libel so far as he is concerned and it will be open to him to proceed against the libellor in a proper action if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such Court, it can be punished summarily as contempt.

It is not necessary in such cases to prove affirmatively that there has been actual interference with the administration of justice. It is enough if the statement is likely or tends in any way to interfere.

Case-law discussed. (MUKHERJEA J.)

Brahma Prakash Sarma v. *State of Uttar Pradesh*, 1954 SC 10 : 1953 SCR 1169 : 1953 SCJ 521 : 1953 (2) MLJ 231 : 1953 SCA 624 : 1953 MWN 656 : 1953 ALJ 571 : 1953 BLJR 600 : 1954 Cr LJ 238.

Complaints against Judicial Officers.

The members of the executive Committee of a Bar Association passed a resolution stating that in their opinion two particular judicial officers were thoroughly incompetent in law, did not inspire confidence in their judicial work, were given to stating wrong facts when passing orders, and were overbearing and discourteous to the litigant public and lawyers alike and setting out under specific heads the complaints against each seperately and sent copies thereof to the administrative head of these officers for taking suitable action.

Held, that it could not be said that in ventilating their grievances the members exceeded the limits of fair criticism. Though the remarks were of a sweeping nature and could scarcely be justified it could not be said that the circumstances

under which the representation was made were calculated to have the effect of interfering with the administration of justice. The contempt, if any, was only of a technical character.

Held also, that the proceedings against them should have been dropped after their affidavits tendering their apology.

1950 All 556 (FB) Reversed. (MUKHERJEA J.)

Brahma Prakash Sarma v. *State of Uttar Pradesh*, (*ibid*).

Counsel signing application containing scandalous matter.

The counsel who sign applications or pleadings containing matter scandalizing the court without reasonably satisfying themselves about the *prima facie* existence of adequate grounds therefor, with a view to prevent or delay the course of justice, are themselves guilty of contempt of court and it is no duty of a counsel to his client to take any interest in such applications. On the other hand it is his duty to advise his client to refrain from making such allegations. (MAHAJAN C. J.)

M. Y. Shareef v. *Judges of the Nagpur High Court*, 1955 SCR 757 : 1955 SC 19 : 1955 SCA 205 : 1955 SCJ 54 : 1955 BLJR 112 : 1955 Cri LJ 133 : 1955 All WR 6 : 1955 ALJ 90 : 1955 (1) MLJ 13 : 57 Pun LR 198 : 1955 Andh LT (Cri) 72 : 1954 MWN 1003.

Fair criticism.

Judges and courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could treat it as contempt. For it is not by stifling criticism that confidence in courts can be created. (MUKHERJEA J.)

Brahma Prakash Sarma v. *State of Uttar Pradesh*, 1954 SC 10 : 1953 SCR 1169 : 1953 SCJ 521 : 1953 (2) MLJ 231 : 1953 SCA 624 : 1953 MWN 656 : 1953 ALJ 571 : 1953 BLJR 600 : 1954 Cr LJ 238.

The path of criticism is a public way ; the wrong headed are permitted to err therein ; provided that they abstain from imputing improper motives to those taking part in the administration of justice and genuinely exercise a right of criticism and do not act in malice or attempt to impair the administration of justice, they are immune. Justice is not a cloistered virtue ; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

1936 P.C. 141 Referred to.

Where an article in a newspaper preached to the Supreme Court, besides divine detachment, the discarding of extraneous considerations such as politics and policies, *held* that it not only transgressed the limit of fair and bonafide criticism but had a clear tendency to affect the dignity and prestige of the Court and amounted to a gross contempt of Court. (MAHAJAN J.)

In the matter of the Editor, Printer and Publisher, "Times of India, Bombay and Delhi", 1953 SC 75 : 1953 SCR 215 : 1953 SCJ 38 : 1953 SCA 188 : 8 DLR SC 91 : 53 Bom LR 278 : 1953 (1) MLJ 211 : 1953 MWN 171 : 54 Cr LJ 519.

Practice—parties to appeal.

There is no warrant for the practice which is and has been in vogue in India of making the Chief Justice and Judges of a High Court parties to an appeal against the decision of the High Court in a contempt matter. This practice should be discontinued and instead, as in England, the title of such proceedings should be, "In re.....(the alleged Contemner)." (MUDHOLKAR J.)

B. K. Kar v. *The Chief Justice and Companion Judges of the Orissa High Court*, 1961 SC 1367.

Procedure.

The jurisdiction of a High Court in proceedings for contempt of itself is a special jurisdiction. The High Court can deal with it summarily and adopt its own procedure. The Criminal Procedure Code does not apply in matters of contempt triable by the High Court. Hence the Supreme Court cannot order transfer of an original petition for contempt of a High Court. (BOSE J.)

Sukhdev Singh v. *Teja Singh, Hon'ble C. J.*, 1954 SC 186 : 1954 SCR 454 : 1954 SCJ 67 : 1954 SCA 363 : 9 DLR SC 120 : 1954 AWR 186 : 1954 (1) MLJ 137 : 1954 MWNÆ131 : 55 Cr LJ 460.

Who may deal with.

It is desirable on general principles of justice that a judge who has been personally attacked should not as far as possible hear a contempt matter which to that extent concerns him personally. It is otherwise when the attack is not directed against him personally. No general rule should be laid down because there may be cases where that is impossible as for example in a court where there is only one judge, or there are two and both are attacked. Other cases may also arise when it is more convenient and proper for the judge to deal with the matter himself as for example in a contempt *in faice curiae*. (BOSE J.)

Sukhdev Singh v. *S. Teja Singh, Hon'ble C. J.*, (*ibid.*)

Apology.

The proposition is well settled and self-evident that there cannot be both justification and an apology. The two things are incompatible. An apology is not a weapon of defence to purge the guilty of their offence ; nor is it intended to be evidence of real contriteness.

In border line cases where a question of principle about the rights of counsel and their duties has to be settled an alternative plea of apology merits consideation. (MUKHERJEA C J.)

M Y Shareef v *Judges of the Nagpur High Court*, 1955 SCR 757 : 1955 SC 19 : 1955 SCA 205 : 1955 SCJ 54 : 1955 BLJR 112 : 1955 Cri LJ 133 : 1955 All WR 6 : 1955 ALJ 90 : 1955 (1) MLJ 13 : 57 Pun LR 198 : 1955 Andh LT (Cri) 72 : 1954 MWN 1003

Members of Bar Associations.

It cannot be disputed that in matters of contempt the members of a Bar Association do not occupy any privileged or higher position than ordinary citizens. (MUKHERJEA J.)

Brahma Prakash Sarma v. *State of Uttar Pradesh*, 1954 SC 10 : 1953 SCR 1169 : 1953 SCJ 521 : 1953 (2) MLJ 231 : 1953 SCA 624 : 1953 MWN 656 : 1953 ALJ 571 : 1953 BLJR 600 : 1954 Cr LJ 238.

Contempt of Court and libel action—distinction.

It may be that pleas of justification or privilege are not strictly speaking available to the defendant in contempt proceedings. The question of publication also in the technical sense in which it is relevant in a libel action may be inappropriate to the law of contempt. (MUKHERJEA J.)

Brahma Prakash Sarma v. *State of Uttar Pradesh*, (*ibid*).

CONTEMPT OF COURTS ACT, 1952 : **S. 3, Court—what is.**

The pronouncement of a definitive judgment is considered the *sine qua non* of a court, apart from the trappings of a judicial Tribunal and unless and until a binding and authoritative judgment can be pronounced by a person or body of persons it cannot be predicated that he or they constitute a court. The inclusive definition of 'Court' in the Evidence Act is not to be extended where such an extension is not warranted.

English Law Reviewed.

A Commissioner appointed under the Public Servants (Enquiries) Act, 1850 is not a court within the meaning of the Contempt of Courts Act, 1952.

1951 Punj 49 Overruled ; 1954 Patna 289 Reversed. Discussion in 1954 Nag 71 Criticised (but *ratio* therein approved). (BHAGWATI J.)

Brajnandan Sinha v. *Jyothi Narayan*, 1955 (2) SCR 955 : 1956 SC 66 : 1956 SCA 52 : 1956 SCJ 155 : 1956 Cri LJ 156 : 1956 ALJ 164 : 1956 BLJR 155 : 35 Pat 65.

S. 3(2)—Jurisdiction when ousted.

The jurisdiction of the High Court is excluded only where the alleged contempt of the Subordinate Court is punishable as contempt under the Indian Penal Code and not when the act complained of amounts to other offences (e.g., defamation) under the Penal Code.

1943 Nag. 334 Overruled. (MUKHERJEA J.)

Bathina Ramakrishna Reddy v. *State of Madras*, 1952 SC 149 : 1952 SCR 425 : 1952 SCJ 137 : 1952 (1) MLJ 736 : 65 LW 514 : 1952 MWN 393 : 1952 MWN (Cr) 97 : 7 DLR SC 161 : 90 CLJ 14 : 1952 Cr LJ 832 : BLR 1952 SC 183.

Accusations against Magistrate—Scandalising Court.

An accused filed an application purporting to be one made under S. 528 Cr. Pr. Code and an affidavit containing serious aspersions against the Magistrate, *viz.*, that he had a hand in a conspiracy to involve the accused in a false case and that the Magistrate had been paid illegal gratification.

It was contended that *prima facie* the act complained of amounted to an offence under S. 228 I.P.C. and therefore the jurisdiction of the High Court to take cognizance of it and proceed in contempt was ousted.

Held, (negativing the contention), the application and the affidavit amounted to something more than a mere personal insult to the Magistrate, they scandalised the Court itself and impaired the administration of justice and therefore constituted contempt and that therefore section 3 (2) did not stand in the way.

1955 Madh BLR (Cri) 111 Reversed. (S. K. DAS J.)

State of Madhya Pradesh v. *Revashankar*, 1959 SCR 1367 : 1959 SCJ 86 : 1959 SC 102 : 1960 Andh LT 712 : 1959 All WR 17 : 1959 MPC 25 : 1959 MPLJ 251 : 1959 Cr. LJ 251 : 1959 MLJ (Cr) 14 : 61 Punj LR 343 : 1959 Nag LJ 85 : 1959 (1) MLJ 84 : 1959 (1) An WR 84.

Defamation of Judge and contempt.

What is made punishable by the Penal Code is the offence of defamation as defamation and not as contempt of court. If a defamation of a subordinate Court

amounts to contempt of Court, proc—**forte**s can be taken under S. 3 of the Contempt of Courts Act apart from the other remedy open to the aggrieved officer under S. 499 I.P.C. But a libel attacking the integrity of a judge may not in particular circumstances amount to contempt at all although it may be subject matter of a libel proceeding.

1893 A.C. 138 Relied on. (MUKHERJEA J.)

Bathina Ramakrishna Reddy v. *State of Madras*, 1952 SC 149 : 1952 SCR 425 : 1952 SCJ 137 : 1952 (1) MLJ 736 : 65 LW 514 : 1952 MWN 393 : 1952 MWN (Cr) 97 : 7 DLR (SC) 161 : 90 CLJ 14 : 1952 Cr LJ 832 : BLR 1952 SC 183.

CONTRACT ACT, 1872

Contract of Service.

(1) Distinction between a contract of service and a contract for services :

See *Harish Chandra Bajpai* v. *Triloki Singh*, 1957 SC 444.

(2) Tests for deciding whether a contract is one of employment :

See *Dhrangadhar Chemical Works Ltd.* v. *State of Saurashtra*, 1957 SC 264.

Description of party to contract.

There is no reason to take the view that the description given by a party to a contract about his status while he signed the contract is no part of the contract itself. (GAJENDRAGADKAR J.)

Bhagwan Singh v. *Rameshwar Prasad*, 1959 SC 876.

S. 2(a), (b)—mere statement of price.

The mere statement of the lowest price at which the vendor would sell contains no implied (offer which when accepted would bring about a concluded) contract to sell at that price to the persons making the enquiry.

(1893) A. C. 552 Followed. (FAZAL ALI J.)

Macpherson v. *Appanna*, 1951 SC 184 : 64 LW 535 : 1951 SCR 161 : 1951 SCJ 257 : 6 DLR (SC) 243 : 1951 ALJ 67 : 1951 MWN 334 : BLR 1951 SC 162.

Offer and acceptance.

When a conditional offer lapses due to the condition not being accepted by the other party, the question whether it is supported by consideration does not arise, since the offer has not ripened into a concluded contract.
(VENKATARAMA IYER J.)

Pipraich Sugar Mills Ltd. v. *P. S. Mills Mazdoor Union*, 1956 SCR 872 : 1957 SC 95 : 1957 SCJ 38 : 1957 SCA 28 : 1957 (1) Lab LJ 235 : (1957) 11 FJR 262.

S. 2(d)—Distinction between two classes of contracts.

An executed consideration consists of an act from a promise. It is the act which forms the consideration. No contract is formed unless and until the act is performed, e.g. the payment for a railway ticket, but the act stipulated for exhausts the consideration, so that any subsequent promise without further considera-

tion, is merely a *nudum pactum*. In an executed consideration the liability is outstanding on one side only ; it is a present as opposed to a future consideration.

In an executory consideration the liability is outstanding on both sides. It is in fact a promise for a promise, one promise is bought by the other. The contract is concluded as soon as the promises are exchanged. In mercantile contracts this is by far the most common variety. In other words, a contract becomes binding on the exchange of valid promises, one being the consideration for the other.

It is clear therefore that there is nothing to prevent one of the parties from carrying out his promise at once, i.e., performing his part of the contract, whereas the other party who provides the consideration for the act of or detriment to the first may not carry out his part of the bargain simultaneously with the first party. If the contract has been fully and completely performed on both sides no question of any further rights and liabilities under the contract is likely to arise. If, however, the contract is one for which the consideration is executed on one side, there will be a riight on one side and an outstanding liability on the other. If the consideration s executory on both sides, there will be outstanding rights and liabilities on both sides. (S. K. DAS J.)

Union of India v. *M/s. Chamanlal Loona and Co.*, 1957 SC 652 : 1957 SCJ 719 : 1957 SCA 825.

Ss. 20 and 21—Mistake.

The Government had entered into a mining lease with one K. There was a clause as to forfeiture on assignment of the lease by the lessee. K purported to assign the lease under an unregistered deed. Subsequently the Government entered into an agreement of lease with the plaintiff, representing to it that they had the right to forfeit the prior lease. But the assignment not being by a registered instrument, the forfeiture did not and could not legally take effect. The plaintiff sued for specific performance and the Government pleaded mistake.

Held that as a result of the forfeiture failing to take effect the Government became incapable of making out the title it had asserted at the time of the contract, but its title was not wholly gone and was restricted only by reason of the prior lease which had still several years to run and that in the circumstances while it might have been open to it to repudiate the contract if it so liked the Government could not certainly plead that the contract was void on the ground of mistake and refuse to perform that part of the agreement which it was possible for it to perform.

Held also that the mistake, if any, was with regard to the legal effect of the law of Registration upon the validity of the assignment deed and that such mistake would be a mistake of law and under S. 21 the contract would not be void on that ground.

1952 Patna 393 Reversed. (GHULAM HASAN J.)

Kalyanpur Lime Works v. *State of Bihar*, 1954 SC 165 : 1954 SCR 958 : 1954 SCJ 99 : 1954 SCA 278 : 9 DLR SC 211 : 1954 (1) MLJ 305.

S. 23 [The consideration or object of an agreement is lawful, unless it is forbidden by law ; or.....
.....if permitted, it would defeat the provisions of any law ; or.....
.....
the Court regards it as immoral or opposed to public policy.....
.....
.....Every agreement of which the object or consideration is unlawful is void.]

"defeat the provisions of any law"—forfeiture on insolvency.

A rule or an agreement which provides that on the adjudication of a person as an insolvent the amounts standing to his credit in the Provident Fund of the company of which he is an employee shall be liable to be forfeited to the fund is invalid. In India, a man may give, only by will, property or its income to a donee with a condition that the donee's interest will cease on bankruptcy and the property will go to another. (CHANDRASEKHARA IYER J.)

Muktilal Agarwala v. *Trustees of Provident Fund of Tin Plate Co.*, 1956 SC 336 : 1956 SCR 100 : 1956 SCJ 406 : 1956 SCA 675 : 69 LW 930 : 1956 (1) MLJ 183 : 1956 ALJ 383 : 1956 (2) Lab LJ 215.

"immoral"—wager.

The concept of immorality is confined by precedents only to sexual immorality and has not been applied to any other head of immorality so that a new head cannot be evolved so as to bring in wagers within its fold.

1958 Cal. 703 Affirmed. (SUBBA RAO J.)

Gherulal Parakh v. *Mahadevdas Maiya*, 1959 SC 781 : 1959 SCJ 878 : 1959 Sup. 2 SCR 406 : 1959 (2) SCA 342 : 1959 (2) MLJ 81 : 1959 (2) An WR 81.

"public policy"—wager.

There is no definite head or principle of public policy evolved by precedents directly applying to wagering contracts. Even if it is permissible for the Court to evolve a new head of public policy under extraordinary circumstances giving rise to incontestable harm to the society, it cannot be said that wager is one of such instances of exceptional gravity.

1958 Cal. 703 Affirmed. (SUBBA RAO J.)

Gherulal Parakh v. *Mahadevadas Maiya*, (*ibid*).

Partnership to carry on wager.

Though wagering contracts are void and unenforceable they are not forbidden by law and therefore the object of a collateral agreement is not unlawful. A partnership agreement to carry on wagering contracts is not therefore unlawful. Nor can such a partnership be said to be immoral or opposed to public policy.

1958 Cal. 703 Affirmed. (SUBBA RAO J.)

Gherulal Parakh v. *Mahadevdas Maiya*, (*ibid*).

S. 29—Capable of being made certain.

A contract for sale of goods contained a term that it was "subject to the usual *force majeure* clause". It was contended that the contract was void for uncertainty as there was no *consensus ad idem* and the parties had not specified which *force majeure* clause they had in mind.

Held, it was clear that the impugned clause was capable of being made certain and definite by proof of the fact that, between the parties or in the trade, there was invariably included a *force majeure* clause of a particular kind and that the contract was therefore not void for vagueness. (HIDAYUTULLAH J.)

Dhanrajmal Govindram v. *Shamji Kalidas*, 1961 SC 1285.

Vagueness.

A contract for sale of goods contained a clause that in the event of the failure

of the buyer to obtain the necessary import licence and to communicate the number thereof to the seller by a certain date, the seller was entitled at his discretion either to carry over the goods or to ask the buyers to pay for the contracted goods and take delivery in British East Africa. By a subsequent letter agreed to by both parties, the seller confirmed that "if necessary" he would carry over for two months subject to the payment of the charges. It was contended that the words "if necessary" were entirely vague and did not show "necessary" for whom and why and that therefore the contract was void for uncertainty.

Held, (negativing the contention), the seller had by this letter surrendered his absolute discretion to a certain extent and the clause meant that the contract was not extended to two more months but that the seller would extend it to that period, if the occasion demanded and therefore the contract cannot be said to be void for vagueness. (HIDAYATULLAH J.)

Dhanrajamal Gobindram v. *Shamji Kalidas*, 1961 SC 1285.

S. 30—Wagering contract.

When two parties enter into a formal contract for the sale and purchase of goods at a given price and for their delivery at a given time it may be that they never intended an actual transfer of goods at all but they intended only to pay or receive the difference according as the market price should vary from the contract price. When such is the intention it has been held that it is not a commercial transaction but a wager on the rise or fall of the market which comes within the connotation of "gambling". (DAS GUPTA J.)

B and G Exchange Ltd. v. *State of Punjab*, 1961 SC 268.

S. 43 : .....

[Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance....., unless a contrary intention appears from the contract.]

Unless a contrary intention appears from "the contract".

The words "the contract" can only refer to the main contract between the promisors on the one side and the promisee on the other. (BOSE J.)

Kedarlal v. *Harilal*, 1952 SCR 179 : 1952 SC 47 : 1952 SCJ 37 : 7 DLR SC 133 : BLR 1952 SC 81 : 65 LW 179 : 1952 (1) MLJ 431 : 1952 MWN 104.

S. 55—when time is of the essence.

A contract of sale of goods contained a clause "This contract is subject to import licence, and therefore the shipment date is not guaranteed" and it was contended that the parties intended that quite apart from delay in obtaining import licence, the shipment date was not guaranteed.

Held, (negativing the contention), having regard to the fact that in commercial contracts time is ordinarily of the essence of the contract and to the natural grammatical meaning of the word "therefore", the parties intended that to the extent that delay in obtaining import licence stood in the way of keeping to the agreed shipment date that shipment date was not guaranteed. (DAS GUPTA J.)

China Cotton Exporters v. *Beharilal Ramacharan Cotton Mills*, 1961 SC 1295.

One D agreed to transport coal for one R. It was agreed that R was to make payments regularly every month of bills submitted by D for despatch of coal and that R should keep the road in good repair. R sued D for damages for stopping the work. It was found that R had not paid the bills within the stipulated time or

within a reasonable time after presentation, and that R had also not kept the road in repair.

Held, the case was covered by Sec. 55 and D was entitled to rescind the contract and could not be held liable in damages. (HIDAYATULLAH J.)

Mahabir Prasad Rungta v. *Durga Datta*, 1961 SC 990 : 1961 (1) SCA 173 : 1961 (1) SCJ 142.

S. 56—impossibility of performance—when seller may plead.

Before the seller can be heard to say that the non-supply was due to default on the part of his suppliers or some other cause beyond his control the seller is bound to show that he himself did all in his power to ensure timely supply. He can do so by showing that he had made a contract under which he was entitled to obtain the supplies in good time. If under his contract with his own suppliers he was not so entitled but there was merely a chance of his getting supplies in time to enable him to honour his contract, the non-supply will clearly be due to his own default in not making a contract which would have so entitled him and not to a default on the part of his supplier or to a circumstance beyond his control. (DAS GUPTA J.)

China Cotton Exporters v. *Beharilal Ramcharan Cotton Mills*, 1961 SC 1295.

Frustration—Scope of the doctrine.

The doctrine of frustration is really part or an aspect of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done, and hence comes within the purview of Section 56. It would be incorrect to say that the section applies to physical impossibility and that where it is not applicable recourse can be had to principles of English law on the subject of frustration. To the extent that the Indian Contract Act deals with a particular subject it is exhaustive of the same and it is not permissible to import the principles of English law *de hors* these statutory provisions.

In cases where the Court gathers as a matter of construction that the contract itself contains impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of S. 56 altogether. Although in English law they are treated as cases of frustration, in India they would be dealt with under S. 32 dealing with contingent contracts or similar other provisions contained in the Act. In the large majority of cases, however, the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the Court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. Here there is no question of finding out an implied term embodying a provision for discharge. (MUKHERJEA J.)

Satyabrata Ghose v. *Mugneeram Bangur & Co.*, 1954 SC 44 : 1954 SCR 310 : 1954 SCJ 1 : 1954 SCA 187 : 9 DLR SC 113 : 1954 AWR 123 : 1954 (1) MLJ 41 : 1954 MWN 197.

Contract for sale of land—Applicability.

There is no conceivable reason why the doctrine of frustration should not be applicable to contracts for sale of land in India. (MUKHERJEA J.)

Satyabrata Ghose v. *Mugneeram Bangur & Co.*, (*ibid*).

Performance becoming onerous.

A contract is not frustrated merely because the circumstances in which it was made are altered. There is no general liberty reserved to Courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events the performance of the contract may become more onerous, *e.g.*, increase in prices on account of world war. Nor can the court, while holding the parties bound by the contract depart from the express terms thereof and award payment of consideration for performance of the contract at rates different from the stipulated rates on some vague plea of equity.
(SHAH J.)

Alopi Parshad v. *Union of India*, 1960 SCJ 763 : 1960 SC 588 : 1960 (2) SCR 793 : 1960 (2) SCA 45 : (1960) 2 Punj 85 : 1960 (2) MLJ 46 : 1960 (2) An WR 46.

Promisor's own default.

Where the terms of an agreement to supply cloth were as follows : "61 bales as noted below are to be given to you by us. We shall continue sending goods as soon as they are prepared to you upto 17-11-41. We shall go on supplying goods to you of the V Mills as soon as they are supplied to us by the said Mill. We shall go on delivering the goods to you upto 17-11-41 out of the goods noted above which will be prepared by the Mill" ; and the goods were not supplied on the ground that the performance of the contract was frustrated by circumstances beyond the seller's control ;

Held, the agreement does not convey the meaning that delivery was made contingent on goods being supplied to the seller by the said V Mill. The words "prepared by the Mill" are only a description of the goods to be supplied and the expressions "as soon as they are prepared" and "as soon as they are supplied to us by the said V Mill" simply indicate the process of delivery.

50 Ind. App. 9 Followed.

The doctrine of frustration, which, so far as our country is concerned, is embodied in sections 32 and 56 cannot avail the seller in such a case when the non-performance is attributable to his own default. (FAZL ALI J.)

Ganga Charan v. *Firm Ram Charan*, 1952 SC 9 : 1952 SCR 36 : 1951 SCJ 799 : 1952 ALJ 393 : BLR 1952 SC 48 : 7 DLR SC 151.

S. 62 [If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.]

Arbitration clause in old contract.

An arbitration clause in a contract is a collateral term of the contract as distinguished from its substantive terms but nonetheless it is an integral part of it. Therefore when the parties to a contract containing an arbitration clause by natural agreement substitute a new contract for the old one then the arbitration clause of the original contract perishes with it.

Union of India v. *Kishorilal Gupta*, 1959 SC 1362 : 1960 SCJ 1101 : 1960 (1) SCR 493 : 1960 (2) SCA 343.

S. 63—Extension of time.

It will not be open to the promisee by his unilateral act to extend the time for performance of his own accord and for his own benefit. Both the buyer and

seller must agree to extend the time for the delivery of goods. The agreement to extend time need not necessarily be reduced to writing. It may be proved by oral evidence. (GAJENDRAGADKAR J.)

Keshavalal Lallubhai v. *Lalbhai Trikumlal Mills Ltd.*, 1958 SC 512 : 1958 SCJ 866 : 60 Bom LR 948 : 1959 SCR 213 : 1959 SCA 251.

S. 72—Mistake of law.

There is no warrant for ascribing any limited meaning to the word "mistake" as has been used in the section and it is wide enough to cover not only a mistake of fact but also a mistake of law.

76 Ind. App. 244 Relied on ; 1956 All 383 Affirmed. (BHAGWATI J.)

Sales Tax Officer v. *Kanhaiya Lal*, 1959 SC 135 : 1959 SCR 1350 : 1959 SCJ 53 : (1959) 1 All 32 : 1959 (1) MLJ 35 : 1959 (1) An WR 35.

Recovery of tax paid under mistake of law.

In a proceeding for recovery of tax paid under a mistake of law, it was contended that (1) inasmuch as the payment was in discharge of tax liability and was voluntary and (2) as the tax collected had been spent away by the State, the amount could not be recovered.

Held, on a plain reading of section 72 no distinction can be made in respect of a tax liability and any other liability and voluntary payment of such tax liability is not by itself enough to preclude a person from recovering the amounts, once it is established that the payments were made under a mistake of law and he is entitled to recover it, subject however to questions of estoppel, waiver, limitation or the like.

1934 Mad 420 and 1937 Mad 559 explained and treated as not good law.

Held, further, that equitable considerations can scarcely be imported when there is a clear and unambiguous provision of law which entitles a person to the relief claimed by him and that therefore the fact that the State had not retained the tax collected but had spent it away in the ordinary course of its business will not disentitle the person to recover the monies.

Observation in (1951) Nag 457 Disapproved. (BHAGWATI J.)

Sales Tax Officer v. *Kanhaiya Lal*, (*ibid*).

S. 73 [When a contract has been broken, the party who suffers by....breach is entitled to receive from the party who has broken....., compensation for.....loss..... caused....naturally.....from such breach or which the parties knew.....to be likely to result.....

.....

When an obligation resembling....contract.....has not been discharged,.....person injured....is entitled to receive the same compensation from the party in default, as if.....had contracted.....

Explanation :—In estimating..damage.., the means....of remedying the inconvenience caused....be taken into account.]

General principle cannot be laid down.

A general principle cannot be laid down for measuring the amount of damages and every case must to some extent depend upon its own circumstances. (MAHAJAN J.)

Trojan & Co. v. *Nagappa Chettiar*, 1953 SC 235 : 1953 SCR 789 : 1953 SCJ 345 : 1954 SCA 710 : 8 DLR SC 436 : 1953 (1) MLJ 729.

Speculative transaction—Measure of damages.

Principles indicated.
Trojan & Co v. *Nagappa Chettiar*, (*ibid*).

Quantum meruit—**when cannot be applied.**

Compensation *quantum meruit* is awarded for work done or services rendered, when the price thereof is not fixed by a contract. It cannot be awarded when the contract provides for the consideration payable for work done pursuant to the contract. An express stipulation cannot be displaced by assuming that it is not reasonable. (SHAH J.)

Alopi Parshad v. *Union of India*, 1960 SCJ 763 : 1960 SC 588 : 1960 (2) SCR 793 : 1960 (2) SCA 45 : (1960) 2 Punj 85 : 1960 (2) MLJ 46 : 1960 (2) An WR 46.

Interest on damages.

It is well settled that interest is allowed by a court of equity in the case of money obtained or retained by fraud. The agent must also pay interest in all cases of fraud and on all bribes and secret profits received by him during the agency. (MAHAJAN J.)

Trojan & Co. v. *Nagappa Chettiar*, 1953 SC 235 : 8 DLR SC 436 : 1953 SCR 789 : 1953 SCJ 345 : 1954 SCA 710 : 1953 (1) MLJ 729.

Duty to minimise loss.

When the contract was for the purchase of burnt bricks only and the seller sustains a loss owing to the failure of the purchaser to take delivery (according to a term of the contract), the seller has a duty under Sec. 73 to minimise the loss. He could have sold the bricks in the market and claimed the difference in the price or stack them elsewhere and claim compensation. (BOSE J.)

Thawardas v. *Union of India*, 1955 (2) SCR 48 : 1955 SC 468 : 1955 SCA 862 : 1955 SCJ 445 : 1955 (2) MLJ 23 : 57 Pun LR 369 : 34 Pat 359 : 1955 MWN 782.

S. 73 [When a contract....contains any other stipulation by way of penalty, the party ....is entitled.....to receive.....reasonable compensation not exceeding.....the penalty stipulated for.]

Award of maximum penalty.

A contract providing for liquidated damages stipulated for the payment of the difference between the contract price and the market price on the date of default and in addition a sum of 10 shillings per ton above that. The arbitrators in London awarded the difference and also the maximum penalty at the rate of 10 Sh. *Held*, the award granting the maximum could not be said to be bad on the face of it or against the law of India.

1955 (1) Cal 29 Affirmed. (WANCHOO J.)

Shiva Jute Baling Ltd. v. *Hindley and Co.*, 1960 (1) SCR 569 : 1959 SC 1357 : 1960 (2) SCA 500 : 1960 SCJ 35 : 1960 (1) MLJ 1 : 1960 (1) An WR 1.

Relief against penal interest.

When the courts below had found that the stipulation as to payment of compound interest at the rate of 9% in case of default was penal, *held*, the proper

course would be to relieve against this penalty by allowing 7% simple interest which as a matter of fact was the original rate of interest. (MUKHERJEA J.)

Cheruvu Nageswaraswami v. *Viswasundara Rao*, 1953 SC 370 : 1953 SCR 894 : 1953 SCJ 539 : 8 DLR SC 509 : 1953 (2) MLJ 252.

S. 179—Sub-pledge by pledgee.

Where certain securities were left with a Bank and charged with the payment of such amount as may, from time to time, be advanced under an overdraft arrangemen but no sum was drawn from the Bank in pursuance of the overdraft agreement,

Held, the charge created was not an absolute one without reference to the state of accounts of the pledgor with the Bank and would arise only when there was an adverse balance against the pledgor and that so long as there was no overdraft by the pledgor, the pledgee Bank had no such interest in the securities as it could, in its turn, sub-pledge to a third party. (SINHA J.)

Jaswantrai Manilal v. *State of Bombay*, 1956 SC 575 : 1956 SCR 483 : 1956 SCJ 613 : 1956 SCA 941 : 1956 (2) MLJ 49 : 26 Comp. Cas. 340 : 58 Bom LR 1026 : 1956 All WR 126.

S. 188—Estate Agent—authority to conclude contract of sale.

House or estate agents are in a different position from brokers at stock exchanges, owing to peculiarities of property with which they are to deal which does not pass by a short instrument as stocks and shares do, but has to be transferred after investigation of title as to which various special stipulations particularly concerning the owner may have to be inserted in a concluded contract. The parties do not, therefore, ordinarily contemplate that the agent should have authority to complete the transaction in such cases. (PATANJALI SASTRI J.)

Abdulla Ahmed v. *Animendra Kissen*, 1950 SCR 30 : 1950 SC 15 : 1950 SCJ 153 : 1950 RLW 139 : 5 DLR (SC) 17.

Ss. 211, 212—agent's liability for negligence.

In the case of agent's negligence he is liable to make good the damage directly arising from his neglect but not indirectly or remotely caused by such neglect or misconduct. (KANIA C. J.)

Pannalal Jankidas v. *Mohanlal*, 1951 SC 144 : 64 LW 557 : 1950 SCR 979 : BLR 1951 SC 140 : 1951 SCJ 149 : 53 Bom LR 472 : 1951 (1) MLJ 314.

S. 222—agent's right to indemnity.

The defendant residing in Marwar appointed the plaintiff as his agent to enter into forward contracts on his behalf in Indore. A notification issued by the Marwar Government had declared all such forward contracts illegal. The plaintiff brought a suit in Marwar for amounts paid by him on behalf of the defendant. It was contended that even if the sale or purchase under the contracts might have taken place outside Marwar, yet the notification hit not only the forward contracts of sale and purchase but the contract of agency itself relating to such transactions and that as the contract of agency was to be performed in Marwar it could not be enforced there.

Held, (negativing the contention), the payment by the plaintiff of losses resulting from transactions to third parties, was certainly lawful as it was made in Indore, that the contract of agency was entirely collateral to the contracts of pur-

chase and sale and that the right of the agent to indemnity which is an incident of the contract of agency was not hit by the notification.

1952 Raj 81 Reversed. (MUKHERJEA J.)

Kishan Lal v. *Bhanwar Lal*, 1954 SC 500 : 1955 (1) SCR 439 : 1954 SCJ 542 : 1955 SCA 592.

CONTRIBUTION—**Contract Act, S. 43 and Transfer of Property Act, S. 82.**

Both section 43 of the Contract Act and section 82 of the Transfer of Property Act deal with the question of contribution between co-debtors. S. 43 of the Contract Act deals with contracts generally. S. 82 of the Transfer of Property Act applies to mortgage transactions. When the right to contribution arises out of a mortgage, S. 82, T.P. Act, being a special law dealing with a particular matter must exclude the general law contained in S. 43, Contract Act.

(BOSE J.)

Kedarlal v. *Harilal*, 1952 SC 47 : 1952 SCR 179 : 1952 SCJ 37 : 1952 (1) MLJ 431 : BLR 1952 SC 81 : 1952 MWN 104 : 65 LW 179 : 7 DLR (SC) 133.

CO-OPERATIVE SOCIETIES ACT, 1912—**Rules 18 and 30 (3)—whether Registrar may be Arbitrator.**

The fact that the Registrar gave a notice to the members of the Managing Committee of a society asking them to show cause why they should not be suspended under rule 30(3) framed under the Act in connection with a defalcation of monies of the society, will not make him a biassed person who could not act as a Judge or arbitrator in an application made under Rule 18 by some shareholders for an award against the members of the committee directing them to pay the loss.

1956 Ajmer 63 Reversed. (WANCHOO J.)

Registrar Co-operative Societies v. *Dharanichand*, 1961 SC 1743.

CO-OWNERS—**Right to partition.**

Partition is a right incident to the ownership of property and once parties are held to be co-owners, their right to partition cannot be resisted.

(GHULAM HASAN J.)

Chhote Khan v. *Mal Khan*, 1954 SC 575 : 1955 (1) SCR 60 : 1954 SCJ 577.

When the plaintiff is undoubtedly a cosharer, the fact that he is not in (joint) possession of the properties will not disentitle him from claiming partition unless exclusion and ouster are proved. (FAZL ALI J.)

Gur Narain Das v. *Gur Tahal Das*, 1952 SCR 869 : 1952 SC 225 : 1952 SCJ 305 : 1952 (2) MLJ 251 : 1952 MWN 507 : 90 CLJ 86 : 65 LW 642 : BLR 1952 SC 259 : 7 DLR SC 377 : 1952 SCA 575.

Adverse possession.

Under the law, possession of one co-sharer is possession of all co-sharers. There cannot be an adverse possession unless there is a denial of one's right to his knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period.

There can be no question of ouster, if there is participation in the profits to any degree. (VENKATARAMA IYER J.)

Mohammad Baqar v. *Naim-un-Nisa Bibi*, 1956 SC 548.

Possession under arrangement.

Where possession was under an arrangement between co-sharers, no question of adverse possession can arise. (GHULAM HASAN J.)

Chhote Khan v. *Mal Khan*, 1954 SC 575 : 1955 (1) SCR 60 : 1954 SCJ 577.

Assertion of joint title after commencement of adverse possession.

Once the possession of one co-sharer becomes adverse to the other as a re ult of oouster, the mere assertion of his joint title (e.g., by the execution of a simple mortgage of his share) by the dispossessed co-sharer unaccompanied by any change of possession, will not interrupt the running of adverse possession. He must actually and effectively break up the exclusive possession of his co-sharer by re-entry upon the property or by resuming possession in such manner as it is possible to do. It may also check the running of time if the co-sharer in exclusive possession acknowledges the title of his co-owner or discontinues his exclusive possession of the property. (MUKHERJEA J.)

Chennabasavappa Gowd v. *Mahabaleshwarappa*, 1954 SC 337 : 1955 (1) SCR 131 : 1954 SCJ 475 : 1954 SCA 835 : 1954 And LJ SC 75 : 1954 (1) MLJ 714 : 1954 MWN 541.

COSTS—Supreme Court—Agreement as to agent's remuneration.

There was an agreement between an Agent of the Supreme Court and his client fixing as remuneration a consolidated sum of Rs. 300/- exclusive of all out of pocket expenses and also providing that in case the party succeeded in the appeal the Agent would have the benefit of the taxed costs. The party succeeded in the appeal.

Held, the latter part of the agreement undoubtedly embodies a contingent promise but as the uncertain event has happened, the contingent obligation has ripened into an absolute one and it is the latter part which was operative and that the Agent was entitled to taxed costs. Nor can it be said that the latter part is unenforceable because it is not a bonafide arrangement and is calculated to aid gambling in lititgation. The Law of maintenance may have some bearing on an agreement to relieve the party of his costs in the event of non-success. The question of champerty can arise again only when the Solicitor is to be paid out of the proceeds of litigation. (MUKHERJEA J.)

Firm of Peddanna v. *K. V. Srinivasayya Setty Sons*, 1954 SC 26 : 1953 SCJ 608.

COURT FEES ACT, 1870

S. 5—"generally or specially".

Merely because the practice in the High Court is to refer disputes as to proper court fees arising on the Original Side to the chamber Judge, it cannot be assumed that he is appointed generally to deal with such disputes and unless there is something to show that he is generally or specially appointed to act under section 5, the order passed by him in the proceeding will not be final.

(GAJENDRAGADKAR J.)

Sathappa Chettiar, S. Rm. Ar. S. Sp. v. *Ramanathan Chettiar*, 1958 SCR 1021 : 1958 SC 245 : 1958 SCJ 407 : (1958) (1) MLJ 148 : (1958) 1 An WR 148.

An order passed as to the sufficiency or otherwise of the court fee paid on a memorandum of appeal by a Division Bench of a High Court in pursuance of

a special order by the Chief Justice on a reference by the taxing officer is final. (GAJENDRAGADKAR J.)

Sathappa Chettiar, S. Rm. Ar. S. Sp. v. *Ramanathan Chettiar*, (*ibid.*)

S. 7 (iv)—suit under-valuation.

Considering the scheme laid down for computation of fees for suits covered by the several sub-sections of S. 7, it is clear that in respect of suits falling under S. 7 (iv), a departure has been made and liberty given to the plaintiff to value his claim for purposes of court fees. And under S. 8 of the Suits Valuation Act, in such suits the value for purposes of court fees shall be the value for the purposes of jurisdiction. Where in such a case the plaintiff, being entitled to fix his own valuation of the suit for payment of court fees, does not, in an attempt to obtain the benefit of a fixed court fee, state a value for court fees but only a value for purposes of jurisdiction alone, it will not be proper to hold the plaintiff bound by his valuation for jurisdiction and to take it as the value for payment of court fees also, but liberty should be given to the plaintiff to amend his plaint and set out specifically the amount at which he seeks to value his claim for payment of court fee.

1949 Lahore 116 Approved. (GAJENDRAGADKAR J.)

Sathappa Chettiar, S. Rm. Ar. S. Sp. v. *Ramanathan Chettiar*, (*ibid.*)

S. 7 (iv) (c) and Art. 17 Sch. II—Consequential relief.

Where on the dismissal of a suit for (1) a declaration that the appointment of the defendant as the Chairman of a Company was invalid and that he had no right to act as the Chairman and (2) for the appointment of a receiver to take charge of the management of the Company till another Chairman was duly appointed, the plaintiff preferred an appeal restricting the claim to the first relief and it was contended on behalf of the respondent that the first relief which was the only relief claimed in the appeal was not purely declaratory in nature and that the words "the Respondent had no right to act as the Chairman" amounted to a consequential relief.

Held, (negativing the contention) that no claim for a consequential relief could be read within that prayer and that the words "the respondent had no right....." were mere repetition in a negative form of what was contained in the earlier part of the prayer. (MAHAJAN J.)

Nemichand v. *Edward Mills Co., Ltd.*, 1953 SC 28 : 1953 SCR 197 : 1952 SCJ 674 : 1952 SCA 817 : 8 DLR SC 28 : 1953 ALJ 136 : 1953 AWR 131 : 1953 (1) MLJ 117 : 66 LW 605 : 1 BLJ 115.

S. 12—"valuation"—whether includes question of category.

The expression "valuation" interpreted in the ordinary meaning "appraisement" cannot be said to necessarily include within its ambit the question of category which is a matter of law. The finality declared by S. 12 is limited only to the question of valuation pure and simple and does not relate to the category under which a certain suit falls, in other words, to questions of fact decided by the Court and not to questions of law.

Case-law discussed.

4 MLJ 183 (F.B), 4 Mad 204 and 1942 Mad 502 Approved. Observations in 1937 Mad 81 Disapproved. (MAHAJAN J.)

Nemichand v. *Edward Mills Co., Ltd.*, (*ibid*).

Applicability to original side appeals in the Madras High Court.

O. II, R.1. of the Madras High Court Fees Rules authorises the levy of fees on plaints filed on the original side under the relevant provisions contained in Chapter III of the Act. The words "in every other respect" occurring in Or. II R. 1 of these Rules in the context clearly indicate that S. 12 of the Act is obviously intended to apply. Hence in an appeal from a decree passed on the original side of the Madras High Court, a Division Bench of the Court can examine the correctness of the fees paid not only on the memorandum of appeal but also on the plaint in a case where no order under S. 5 of the Act had been passed as to the fee payable on the plaint. (GAJENDRAGADKAR J.)

Sathappa Chettiar, S. Rm. Ar. S. Sp. v. *Ramanathan Chettiar*, 1958 SCR 1021 : 1958 SC 245 : 1958 SCJ 407 : 1958 (1) MLJ 148 : 1958 (1) An WR 108.

Schedule I, Art. 9—Proceedings under S. 107, Cr. Pr. C.

A certified copy of judgment of a Criminal Court in proceedings under S. 107 Cr. Pr. C. must bear court fee under Art. 9.

(1953) Trav.-Co. 69 Approved. (GAJENDRAGADKAR J.)

Bhibhuti Bhusan Chatterjee v. *State of Bihar*, 1960 (1) SCR 935 : 1960 SC 128 : 1960 SCJ 179 : 1960 Cr. LJ 171 : 1960 MLJ (Cr) 99 : 1960 BLJR 138.

Schedule II, Art. 17—Memorandum of appeal—omission of claim for consequential relief.

The plaintiff whose suit for a declaration and consequential relief had been dismissed preferred an appeal restricting the relief claimed in the appeal to the first prayer for a declaration and paying court fee thereon. The appellate court directed him to pay additional court fee on the ground that he was able to seek a further relief and dismissed the appeal on the additional court fee not being paid within the time granted.

Held, the order of the Appellate Court was erroneous.

A memorandum of appeal as provided in Art. 1 Sch. I has to be stamped according to the value of the subject matter in dispute in appeal ; in other words the relief claimed in the memorandum of appeal determines the value of the appeal for purposes of court fee. It is always open to the appellant in an appeal to give up a portion of his claim and to restrict it. It is further open to him, unless the relief is of such a nature that it cannot be split up, to relinquish a part of the claim and to bring it within the amount of court fee already paid. The appellant had expressly relinquished the consequential relief he had claimed in the plaint and the only relief claimed in the memorandum of apeal was the declaratory one. As the subject matter of the appeal was purely of a declaratory character, the memorandum of appeal was properly stamped under Art. 17, Sch. 2. The Appellate Court had no jursidiction to demand additional court fee from the appellant and the appeal could not be dismissed for failure to meet it.

53 Mad 48 and 1931 Mad 716 Approved. (MAHAJAN J.)

Nemichand v. *Edward Mills Co., Ltd.*, 1953 SC 28 : 1953 SCR 197 : 1952 SCJ 674 : 1952 SCA 817 : 8 DLR SC 28 : 1953 ALJ 136 : 1953 AWR 131 : 1953 (1) MLJ 117 : 66 LW 605 : 1 BLJ 115.

Court fees—Refund.

The plaintiff, a dismissed Government servant, filed a suit for a declaration that his dismissal was illegal and for recovery of a sum by way of damages. The

law as then understood permitted such a claim to be made. Subsequently the Privy Council decided that such a claim could not be made and that all that a Government servant could ask for was a declaration that the order of dismissal was illegal and that he continued to be in service. The plaintiff in question, therefore, amended the plaint deleting the claim for damages and applied for refund of the court fee paid on the amount of damages claimed ;

Held, the case was not covered by any of the statutory provisions regarding refund of court fees and that the decision of the Privy Council clarifying the position could not be a ground for refund of court fee when at the time it was paid it was in accordance with law as then understood. (IMAM J.)

Om Prakash Gupta v. *State of Uttar Pradesh*, 1955 (2) SCR 391 : 1955 SC 600 : 1955 SCA 832 : 1955 SCJ 640 : (1956) 1 All 131 : 1955 MWN 930 : 1955 (1) Lab LJ 1 : 1955 All WR 511 : 1955 BLJR 550 : 1955 (2) MLJ 136 : 1955 ALJ 617.

CROWN GRANTS ACT, 1895—S. 3.

The scope of S. 3 is that it saves conditions such as conditions in restraint of alienations or enjoyment repugnant to the nature of the estate, limitations offending the rule against perpetuities and the like. The section does not support the contention that an absolute sale of lands by the Government *ipso facto* confers on the purchaser a right to hold the lands free of revenue. (VENKATARAMA IYER J.)

Collector of Bombay v. *Nusserwanji*, 1955 SCR 1311 : 1955 SC 298 : 1955 SCJ 339 : 1955 SCA 692 : 57 Bom LR 723.

CUSTOM

***Dhar Dhura*—whether unreasonable.**

The custom of *Dhar Dhura*, viz., that the deep stream or channel of a river is to be regarded, irrespective of its changes as the constant boundary between two or more villages, which is recognised in S. 2 of Bengal Regulation XI of 1825, cannot be held to be unreasonable, for, though its application might work injustice in certain cases, it affords a convenient and effective way of avoiding boundary disputes and is beneficial to the community. (MUKHERJEA J.)

Ram Dhan Lal v. *Radhe Sham*, 1951 SCR 370 : 1951 SC 210 : 1951 SCJ 307 : 1951 ALJ 60 : 6 DLR SC 180.

Scope.

It is only for the purpose of determining the boundary between certain villages and estates that the custom of *Dhar Dhura* can be invoked ; and unless the river actually divides the villages or estates there can be no question of its being regarded as a boundary line between them. Hence where the river has changed its course and runs entirely outside the villages concerned, the custom of *Dhar Dhura* will not govern the rights of parties and the title to the disputed plot of land must be determined in accordance with the provisions of the Bengal Regulation XI of 1825.

1943 All 68 Reversed. (MUKHERJEA J.)

Ram Dhan Lal v. *Radhe Sham*, (*ibid*).

Pre-emption—Non-Muslims—presumption.

When a custom of pre-emption is established by evidence to prevail amongst non-Muslims in a particular locality it must be presumed to be founded on and

co-extensive with the Muhammedan law on the subject unless the contrary is shown.

39 Ind. App. 101 Relied on. (MUKHERJEA J.)

Audh Behari Singh v. *Gajadhar Jaipuria*, 1954 SC 417 : 1955 (1) SCR 70 : 1954 SCJ 590 : 1955 SCA 132 : 1954 ALJ 529 : 2 BLJ 451.

Proof of custom—onus.

The burden of proving a custom in derogation of the general law being heavily on the party who sets it up, it is incumbent on him to prove by clear and cogent evidence that there is such a custom as pleaded by him. (VENKATARAMA IYER J.)

Mohammad Baqar v. *Naim-un-Nisa Bibi*, 1956 SC 548.

Punjab—General principles.

General principles which should be kept in view in dealing with questions of customary law in the Punjab stated. (FAZL ALI J.)

Gokal chand v. *Parvin Kumari*, 1952 SCR 825 : 1952 SC 231 : 1952 SCJ 331 : 7 DLR SC 360 : 1952 SCA 610 : BLR 1952 SC 265 : 60 LW 646 : 90 CLJ 73.

Proof of ancestral character of property.

The burden is on the plaintiff to establish the ancestral character of the land ; it is not sufficient to show that the name of the common ancestor from whom the parties are descended was mentioned in the Revenue pedigree. It should also be proved that his descendants held the land in ancestral shares and that the land occupied at the time of the dispute by the proprietors thereof had devolved upon them by inheritance. (BOSE J.)

Kura v. *Jagram*, 1954 SC 269 : (1954) Patiala 82.

Succession—general custom—Rattigan's Digest.

The general custom of the Punjab is that a daughter excludes the collaterals, even though they are within the fourth degree, from succession to the self-acquired property of the father.

Rattigan's Digest of Customary Law, para 23(2) approved ; 1954 SC 579 Ref. to.

Hence the initial onus is on the collaterals to show that the general custom has been varied by a special local custom excluding the daughter which is binding on the parties.

(1941) Lah 154 (PC) Followed. (S. R. DAS J.)

Salig Ram v. *Mt. Maya Devi*, 1955 SCR 1191 : 1955 SC 266 : 1955 SCJ 248 : 1955 SCA 332 : 57 Pun LR 247 : (1955) Punj 167.

Rattigan's Digest—sister.

In the state of conflict of judicial decisions in the Punjab, it cannot be held on the authority of para 24 of the Rattigan's Digest that a general custom excluding sisters from inheritance in regard to non-ancestral property as against collaterals exists among the agricultural tribes of the Punjab.

1953 Punj. 177 Affirmed. (SARKAR J.)

Ujagar Singh v. *Mst. Jeo*, 1959 SC 1041 : 1960 SCJ 16 : 1959 Sup 2 SCR 781 : (1959) Punj 1735.

Riwaj-i-am—**applicability.**

Questions and answers in the *Riwaj-i-am* refer ordinarily to ancestral property and not self-acquired property unless there is clear indication to the contrary.

(1944) Lahore 228 Approved ; 14 Lah 630, 25 Punj Re 1912, 29 Punj Re 1911 and 1949 EP 328 Overruled.

Jai Kaur v *Sher Singh*, 1960 SC 1118 : (1960) 2 Punj 615.

Riwaj-i-am entries are to be taken as referring to customs relating to succession to ancestral properties unless it is stated to be otherwise.

25 Lah 228 (FB) Approved. (SARKAR J.)

Ujagar Singh v. *Mst. Jeo*, 1959 SC 1041 : 1960 SCJ 16 : 1959 Sup 2 SCR 781 : (1959) Punj 1735.

Entries in *Riwaj-i-am* and Rattigan's Digest.

There is an initial presumption of correctness as regards the entries in the *Riwaj-i-am* and where the custom recorded in the *Riwaj-i-am* is in conflict with the general custom as recorded in the Rattigan's Digest or ascertained otherwise, the former should ordinarily prevail but when the *Riwaj-i-am* adversely affects the rights of females, the presumption would be weak and only a few instances will suffice to rebut it.

1941 PC 21 Ref. to. (DAS GUPTA J.)

Jai Kaur v. *Sher Singh*, 1960 SC 1118 : (1960) 2 Punj 615.

Non-ancestral property—preferential heirs.

Question 43 and answer in the *Riwaj-i-am* refers only to ancestral property and is not relevant evidence to establish the existence of a custom among Grewal Jats of Ludhiana district entitling collaterals to succession to non-ancestral property in preference to daughters. On the other hand the customary law among them is the same as recorded generally for the Punjab in Para 23 of the Rattigan's Digest, i.e. the daughter is preferred to collaterals. (DAS GUPTA J.)

Jai Kaur v. *Sher Singh*, (*ibid*).

DEBT RELIEF ACTS

BENGAL MONEY LENDERS ACT, 1940—**S. 2 (2) and (12)—unpaid purchase money.**

Unpaid purchase money due to a vendor under a contract of sale is not a loan within the meaning of the Act, where there is nothing to show that it was intended by the parties that the original character of the money had been changed into a loan.

Where under a compromise decree in a suit for specific performance, the vendor accepted payment of a portion of the money payable under the agreement of sale immediately and the balance was to be paid in certain instalments with interest at the same rate as provided in the agreement of sale and the property was vested in the purchaser and a charge for the payment of the instalments was created,

Held, the money due to the vendor remained unpaid purchase money and had not been converted into a loan merely because it was payable in a number of instalments instead of at once and that therefore the Act did not apply to the case.

1954 Cal 105 Affirmed ; 1942 Cal 616 and 1943 Cal 108 Distinguished (SARKAR J.)

Radha Kissen Chamria v. *Keshardeo Chamria*, 1957 SC 743 : 1957 SCA 944 : 1957 SCJ 775.

S. 22 (2)—execution proceeding.

In execution of a mortgage decree the hypotheca was sold and for the sum remaining due a personal decree was passed. The decree holder applied for execution of the personal decree and certain other properties were attached. Meanwhile negotiations for settlement started and therefore, on 30.1.37, the decree holder applied to the court to strike off the execution case but to keep attachment in force and the court so ordered, keeping alive the attachment under the provisions of Or. 21 R. 57 (as amended in Calcutta), C.P.C. Subsequently the judgment debtor conveyed to the decree holder certain property under a private sale in full settlement of the claim under the personal decree. Thereafter on 2.6.1939, the decree holder filed a petition for withdrawing the attachment as the decree had been adjusted and there was no need for attachment continuing and the court ordered cancelling the attachment. Subsequently the mortgagor filed a suit to reopen the transaction under S. 36 of the Act,

Held, (i) the order of 30.1.37 brought the execution case to an end and it could not be said that because the attachment was continued the execution was pending thereafter also ; (ii) the petition dated 2.6.39 was merely a certification by the decree holder of the satisfaction of the decree and not an application such as would initiate a proceeding in execution within the meaning of S. 22 (2), and (iii) as the decrees were passed before 1.1.1939 and no proceeding in execution was started or was actually pending on or after that date the case was not one to which the Act applied.

1949 Cal 266 Affirmed ; 48 C.W.N. 406 (SB) Approved. (S. R. DAS J.)

Pashupathinath Malia v. *Deba Prosanna*, 1951 SCR 572 : 1951 SC 447 : 1951 SCJ 506 : BLR 1951 SC 439 : 7 DLR (SC) 16.

S. 36—Res Judicata.

S. 36 contemplates filing of one suit and not successive suits for reopening transactions including decrees and obtaining relief under the Act. It cannot be said that to such a suit the rule contained in O. II R. 2 of the Civil Procedure Code does not apply.

In execution of a mortgage decree the hypotheca was sold and for the balance of amount remaining due a personal decree was passed. During the pendency of the execution proceeding in respect of the personal decree, the Act came into force. The defendant filed a suit under S. 36 to reopen the personal decree. The claim to reopen the preliminary mortgage decree and the decree absolute for sale was deliberately abandoned and the court passed a new decree payable in instalments. The defendant did not pay the instalments and the plaintiff applied for executing the decree. Thereafter the defendant filed another suit under S. 36 to reopen the preliminary and final mortgage decrees.

Held, the right to claim the relief which could have been but was not asked for in the previous suit must be regarded as barred by *Res Judicata* and the second suit must therefore fail. (SHAH J.)

Haridas Mondal v. *Anath Nath Mitra*, 1961 SC 1419.

S. 36—decrees.

The power of reopening transactions contemplated by the section extends to reopening of decrees as well. (MUKHERJEA J.)

Oramba Sundari Dasi v. *Sri Sri Ishwar Gopal Jiew*, 1954 SC 309 : 1954 SCR 988 : 1954 SCJ 423 : 1954 SCA 581 : 9 DLR SC 251.

S. 36(2)—Scope.

In making a new decree under Cl. (a) and giving consequential relief under cl. (c) to the judgment debtor, the Court cannot enter into the question as to whether the decree-holder on record is himself a benamidar for another person in respect of the decree.

The new decree is passed only for the purpose of substituting the method of accounting sanctioned by the Act for the calculations upon which the original decree was passed and grant instalments to the judgment debtor. But except for these the old decree and the adjudications made thereunder are not wiped out and the parties are not relegated to their rights and liabilities under the original cause of action.

1944 F.C. 18 Relied on ; 1949 Cal 315 Reversed. (MUKHERJEA J.)

Oramba Sundari Dasi v. *Sri Sri Ishwar Gopal Jiew*, (*ibid*).

S. 36 (5)—Sub-mortgagee—whether assignee.

Under a sub-mortgage, the original mortgagee also assigned the debt due to him and conveyed his entire interest in the original mortgage. The original mortgagor sued the sub-mortgagee for reopening the transactions under the Act,

Held, the only consideration was whether the assignment was such as to establish a debtor and creditor relation between the assignee and the debtor (original mortgagor) and as the assignment of all the rights in the mortgage must be understood with reference to the sufficiency of the right assigned to enable the sub-mortgagee to sue the original mortgagor in his own right, that was sufficient to make the sub-mortgagee an assignee exempted by section 36 (5).

76 Ind. App. 74 Followed. (PATANJALI SASTRI J.)

Pashupathinath Malia v. *Deba Prosanna*, 1951 SCR 572 : 1951 SC 447: 1951 SCJ 506 : BLR 1951 SC 439 : 7 DLR SC 16.

BIHAR MONEY LENDERS (REGULATION OF TRANSACTIONS) ACT, 1939—**S. 7—tracing back of the debt.**

Where a creditor takes a fresh document from the debtor for the interest due and adding it to the principal amount due under the original document files a suit on the basis of the fresh document, the defendant cannot seek to apply the provisions of S. 7 to the original document ; for under S. 7 the loan must relate to the document on which the suit is based, that is the final document and not the orginal document.

1940 Patna 65, 1942 Patna 138 & 23 Pat 618 (FB) Approved.
(CHANDRASEKHARA IYER J.)

Ramnandan v. *Kapil Deo*, 1951 SCR 138 : 1951 SC 155 : 1951 SCJ 149 : 1952 SCA 13 : 53 Bom LR 472 : 6 DLR SC 122 : 1951 (1) MLJ 314 : BLR 1951 SC 150.

MADRAS AGRICULTURISTS' RELIEF ACT, 1938—**S. 3 (ii) (a) and (b) and S. 10(1)—"saleable interest".**

A right which a judgment debtor had to have a sale of his agricultural land set aside under the provisions of the Civil Procedure Code is not the interest contemplated by Cls. (ii) (a) and (b) which speak of a saleable interest etc., in agricultural land. (CHANDRASEKHARA IYER J.)

Ramakrishna Rao v. *Kandokori Chellayamma*, 1953 SC 425 : 1950 SCR 806.

S. 3, Proviso, Cl. (D) and sections 8 and 19.

In execution of a mortgage decree against a landholder of an estate under the Madras Estates Land Act, the estate was sold on 6.7.1935 before the coming into force of the Agriculturists' Relief Act. An application under Order XXI R. 90, C.P.C. to set aside the sale was pending at the commencement of the Act and thereafter the judgment-debtor filed an application claiming relief under the Act. Under the provisions of the Act the debt was to be deemed to have been fully discharged. The High Court held that by the sale title to the estate passed from the judgment debtor and he ceased to be an estate holder and as such was not hit by cl. (D) of the proviso to S. 3 and was entitled to the benefits of the Act, and that, the decree having been satisfied under the provisions of the Act on the date of sale, the decree holder was liable to repay to the judgment debtor the full sale price,

Held, (allowing the appeal by the decree-holder), the High Court had taken up an inconsistent position. The sale and the entering of satisfaction of the decree must go together. If the sale was final and the decree was satisfied then the decree ceased to exist and no relief could be claimed under the Act. If the order recording satisfaction was not final, the decree was fully satisfied on the date of sale under the provisions of the Act and the property could not be sold in execution of a decree which had been already satisfied. The correct approach to the case would have been to assume for the purpose of the case that neither the sale was final during the pendency of an application to set aside under Or. 21 R. 90 nor the order entering satisfaction of the decree. (FAZL ALI J.)

Ramakrishna Rao v. *Kandokori Chellayamma*, 1953 SC 425 : 1950 SCR 806.

S. 7—Essentials for applicability.

It is not necessary that the applicant for relief himself should be liable for the debt on the date the Act came into force. Nor is it necessary that he should be personally liable for the debt. The relief under the Act is not confined to the person who originally contracted the debt but is available to his legal representative and assigns as well.

Thus in the case of a purchaser of the equity of redemption whose liability to pay the mortgage debt undoubtedly arises on the date of his purchase, it is enough if the debt itself which existed before his purchase was payable by an agriculturist at the relevant date, viz., 22.3.38 and if the applicant himself is an agriculturist on the date of his application. If these conditions are satisfied the purchaser can certainly claim the privileges of the Act.

1946 Mad 434 Not Approved. (MUKHERJEA J.)

Cheruvu Nageswaraswami v. *V. Viswasundara Rao*, 1953 SC 370 : 1953 SCR 894 : 1953 SCJ 539 : 8 DLR SC 509 : 1953 (2) MLJ 252.

S. 19—debt due by agriculturist and non-agriculturist jointly.

Under the general law undoubtedly a mortgage decree is one and indivisible with certain special exceptions. However the Agriculturists Relief Act is a special statute which aims at giving relief not to debtors in general but only to those who are agriculturists as defined by the Act and to this extent it trenches upon the general law. Thus in the case of a mortgage debt when the loan has been advanced to more than one person if one of the debtors happens to be an agriculturist while the others are not, the agriculturist debtor would be entitled to have his debt scaled down in spite of the provision of the general law which prevents a co-mortgagor from denying the liability of his interest in the hypotheca to satisfy the entire mortgage

debt. There is, therefore, nothing wrong in law in scaling down a mortgage decree in favour of one of the judgment-debtors, while as regards the others the decree is kept intact.

Held, in such a case the decree should not only have stated the amount payable by the non-agriculturist mortgagor and the agriculturist co-mortgagors separately but should have expressly stated that on payment of the amount directed to be paid by the agriculturist mortgagors their interest in the hypotheca alone would not be liable to be sold. It should further direct that in case they did not pay this amount, the whole of the hypotheca including their interest would be sold for the entirety of the mortgage debt for which the non-agriculturist co-mortgagor was made liable.

1949 Mad 238 Reversed. (MUKHERJEA J.)

Ramaswami Aiyangar v. *Kailasa Thevar*, 1951 SC 189 : 64 LW 520 : 1951 SCR 292 : 1951 (1) MLJ 560 : 6 DLR SC 211 : 1951 SCJ 278 : 1951 MWN 343 : BLR 1951 SC 167 : 1952 SCA 129.

S. 19 (2) as amended by Act XXIII of 1948—Scaling down of decree passed after amending Act—whether barred by *Res judicata.*

A suit in respect of a debt payable at the commencement of the main Act instituted before the commencement of the amending Act of 1948 (viz., 25.1.49) was pending in appeal on that date and thereafter a decree for repayment of the debt was passed. After the passing of the decree the debtor applied for scaling down under new section 19 (2). The High Court held that since the defendant had failed to ask for the relief when the appeal was pending and before a decree had been passed he was barred from claiming the relief subsequently on the principle of *Res judicata*,

Held, (reversing the judgement), though it is true that the doctrine of *Res judicata* is of wide import and section 11 of the Code of Civil Procedure is not exhaustive of it, the question before the Court was not so much the application of the principle of *Res judicata* as the proper construction of S. 19 of the Act and section 16 (ii) of the amending Act. Section 19 in express terms entitles the defendant to claim relief when the Court has passed a decree after the commencement of the Act for the repayment of a debt payable at such commencement and section 16 (ii) of the amending Act did not stand in the way of the defendant asking for relief under S. 19 (2).

1953 Mad 914 Reversed. (S. K. DAS J.)

(Different considerations will, however, arise if a party asks for relief under the Act at the pre-decree stage and that relief is refused on the ground that the Act does not entitle him to any relief and after such refusal he makes a second application. Then the principle laid down in 1953 Mad 421 will apply and the application must fail.)

Narayanan Chettiar v. *Annamalai Chettiar*, 1959 Sup 1 SCR 1237 : 1959 SC 275 : 1959 SCJ 788 : 1959 (2) MLJ 55 : 1959 (2) An WR 55.

U.P. DEBT REDEMPTION ACT, 1940—**S. 8(1)—pre-requisites.**

There are three pre-requisites for the exercise of the right conferred by the sub-section, viz., (1) the application must be by an agriculturist, (2) that agriculturist must be liable to pay the amount due under a decree to which the Act applies and (3) that decree must have been passed before the commencement of the Act.
(S. R. DAS J.)

Joshi Girjadharji v. *Lachmanji Panth*, 1951 SC 218.

U.P ENCUMBERED ESTATES ACT, 1934—**Object of the Act.**

The object of the Act is to grant relief to the landlord whose estate is encumbered with debts and not to grant relief to the creditors of the landlord.

(1946) All 891 (FB) Not Approved. (MAHAJAN J.)

Deputy Commissioner, Hardoi v. *Ramakrishna Narain*, 1954 SCR 506 : 1953 SC 521 : 1953 SCJ 664 : 1954 SCA 1159 : 1954 ALJ 106 : (1954) All 168 : 9 DLR SC 24 : 2 BLJ 53.

Ss. 4, 6 & 11 (after amendment in 1939)—relief on fresh application.

An application under S. 4 by a landlord judgment-debtor was dismissed by the Board of Revenue and thereafter an order for execution of the decree against him was passed by the Civil Court and a sale of his property took place. Subsequently after the amending Act of 1953 came into force he applied for amendment of his application and it was ordered that proceedings would start afresh. On a notification issued under S. 11, the decree-holder objected claiming that the property sold to him was his property and was not liable to be attached and sold for the debts of the judgment-debtor. It was contended on behalf of the judgment-debtor that S. 11 was retrospective and that therefore the date of his original application should be treated as the date of the start of the proceedings under the Act.

Held, (negativing the contention), the order passed after the amending Act came into force, on the application to amend the proceedings was an order made on a fresh application under S. 4 preferred after the amending Act and could not affect the validity of the sale which took place before the amending Act at a time when no application under S. 4 was pending, the original application having been dismissed by the Board of Revenue earlier. (MAHAJAN J.)

Bhagwant Singh v. *Sri Kishen Das*, 1953 SCR 559 : 1953 SC 136 : 1953 SCJ 188 : 1953 SCA 722 : 1953 ALJ 249 : (1953) 2 All 367.

S. 11—Proceedings under—Creditors whether necessary parties.

The technical rules contained in Or. I of the Civil Procedure Code should not be invoked nor should the eventual interest of a party in the fruits of a litigation be adopted as a test of impleading parties in these proceedings which are of an administrative character. Hence in proceedings under S. 11 if there has been a *bona fide* fight resulting in a decree, in an appeal against that decree it is sufficient that those who took an active part in the proceedings under S. 11 are impleaded. It is not necessary to implead each and every creditor who either did not appear or put forward a written statement under S. 10 or took no active part in the proceedings under S. 11(2).

1942 Oudh 16 ; 1942 Oudh 339 ; (1946) All 891 (FB) Overruled. (MAHAJAN J.)

Dupty Commissioner, Hardoi v. *Ramakrishna Narain*, 1954 SCR 506 : 1953 SC 521 : 1953 SCJ 664 : 1954 SCA 1159 : 9 DLR SC 24 : 1954 ALJ 106 : (1954) All 168 : 2 BLJ 53.

S. 14 (7)—extra territorial operation.

A decree passed by the special judge under the Act (which under S. 14 (7) was deemed to be a decree of a civil court) was, on application of the Additional Collector transfered to a civil court in Bihar for execution.

The execution proceeding in the Bihar Court was opposed on the ground that

the application of the Act by the Bihar Court would result in a U.P. Act affecting property outside U.P.

Held, (negativing the contention), the only result of such application was to remove the objection that the decree of the special judge was not one of a civil court. The Act is not thereby made to affect property outside U.P. Of course, if that decree is to be deemed to be a decree under the Civil Procedure Code it can be executed against any property outside U.P. That however is not the result of the U.P. Act but of the Civil Procedure Code which is a Central legislation and applies to Bihar also.

1954 Patna 164 Reversed. (SARKAR J.)

Sahgal S. K. v. *Maharaj Kishore Khanna*, 1959 SC 809 : 1959 (2) SCA 213 : 1959 Sup 2 SCR 364 : 1959 SCJ 1099 : 1959 All WR 582 : 38 Pat 480.

S. 15—"findings inconsistent with s. 14".

There can be no question of any inconsistency in a finding of a Court which has passed a decree on the basis of a loan with the provisions mentioned in sub-sections (1), (2), (3) and (7) of Section 14. However sub-sections (4), (5) and (6) require careful consideration of the Special Judge in examining the decree of a Civil Court to find out if any of its findings are inconsistent with those provisions.

Even where there has been a decree of a Civil Court in respect of a loan, the special judge is bound to follow the provisions of S. 14 (4) (a) so that the amount of interest which he can hold to be due on the date of the application must not exceed the portion of the principal found to be due on the date of the application.

The contention that all that is necessary to save inconsistency with S. 14(4) (a) is that the principle that the amount of interest shall not exceed the amount of the unpaid principal has been followed in passing the decree and the fact that the result of the finding would be that on the date of the application under S. 4, the interest due would exceed the portion of the principal unpaid on such date is of no consequence cannot be accepted. Nor can the view that the Special Judge has merely to see whether the Civil Court that passed the decree could have passed the decree which it did pass if that Court had to apply the provisions of S. 14 treating the date of the institution of the suit as the date of the application, be accepted as correct.

1939 Oudh 75 Overruled. (DAS GUPTA J.)

Shamsher Singh v. *Sarda Narain Singh*, 1960 SC 1249.

S. 24(3)—limitation.

While an execution proceeding was pending before the Additional Collector, he applied to a civil court in another State for execution against property situated therein,

Held, the application for execution must be deemed to be a continuation of the previous execution proceeding before the Collector and therefore no fresh period of limitation was applicable to the later application. (SARKAR J.)

Sahgal S. K. v. *Maharaj Kishore Khanna*, 1959 SC 809 : 1959 (2) SCA 213 : 1959 Sup. 2 SCR 364 : 1959 SCJ 1099 : 1959 All WR 582 : 38 Pat 480.

DECREE

Construction—use of pleadings and judgment.

When the decree is ambiguous, the executing Court should construe the decree and for the purpose can look into the pleadings and the judgment.

71 Ind. App. 64 Followed. (SUBBA RAO J.)

Topanmal Chhotamal v. *Kundomal Gangaram*, 1960 SC 388.

Compromise decree.

Where a compromise decree provides both for a personal remedy and a charge the question whether the personal remedy can be pursued only after the remedy by way of charge is exhausted depends on the intention to be gathered from the various terms in the compromise decree. (JAGANNADHADAS J.)

Rajeskanta v. *Smt. Shanti Devi*, 1957 SCR 77 : 1957 SC 255 : 1957 SCA 440 : 1957 SCJ 197.

Executability—payment of court fee.

Where a decree provides that the decree-holder should pay the deficit court fee on the decretal amount before execution, it is not a conditional one in the sense that some extraneous event was to happen on the fulfilment of which alone it could be executed. The payment of court fee being entirely in the power of the decree-holder and there being nothing to prevent him from paying it then and there, it is a decree capable of execution from the very date it was passed.
(CHANDRASEKHARA IYER J.)

Yeshwant v. *Walchand*, 1950 SCR 852 : 1951 SCJ 19 : 6 DLR (SC) 73 : 1951 SC 16 : 64 LW 353 : 1951 ALJ 8 : 1951 MWN 286 : 1951 RLW 193 : BLR 1951 SC 15 : 2 Raj LW 193 : 55 Bom LR 486.

Execution—duty of executing Court.

The duty of the executing Court is to give effect to the terms of the decree that has been passed. It is true that it is to interpret the decree but under the guise of interpretation it cannot make a new decree for the parties.
(MUKHERJEA J.)

Ramaswami Aiyangar v. *Kailasa Thevar*, 1951 SC 189 : 64 LW 520 : 1951 SCR 292 : 1951 (1) MLJ 560 : 6 DLR (SC) 211 : 1951 SCJ 278 : 1951 MWN 343 : BLR 1951 SC 167 : 1952 SCA 129.

There is no obligation on the judgment-debtor to post the decree-holder with all the details of his properties. It is the decree-holder's business to gather knowledge so that he can realise the fruits of his decree.
(CHANDRASEKHARA IYER J.)

Yeshwant v. *Walchand*, 1951 SC 16 : 1950 SCR 852 : 1951 SCJ 19 : 6 DLR (SC) 73 : 1951 ALJ 8 : 64 LW 353 : 1951 MWN 286 : 1951 RLW 193 : BLR 1951 SC 15 : 2 Raj LW 193 : 55 Bom LR 486.

DEED

CONSTRUCTION—**All clauses must be given effect to.**

It is a settled rule of interpretation that if there be admissible two contructions of a document, one of which will give effect to all the clauses therein while the other will render one or more of them nugatory, it is the former that should be adopted. (VENKATARAMA IYER J.)

Radha Sundar Dutta v. *Mohd. Jahadur Rahim*, 1959 SC 24 : 1959 SCJ 212 : 1959 SCR 1309.

Conflicting clauses.

If there is a conflict between an earlier clause and the later clauses in a document and it is not possible to give effect to all of them, then the rule of construction is well established that it is the earlier clause that must override the later clauses and not *vice versa*.

1921 PC 209 Referred to. (VENKATARAMA IYER J.)

Radha Sundar Dutta v. *Mohd. Jahadur Rahim*, (*ibid.*)

Extrinsic evidence to determine effect.

Extrinsic evidence to determine the effect of an instrument is permissible when there remains a doubt as to its true meaning. Evidence of acts done under it is a guide to the intention of parties in such a case particularly when the acts done are shortly after the date of the instrument. (MAHAJAN J.)

Abdulla Ahmed v. *Animendra Kissen*, 1950 SCR 30 : 1950 SC 15 : 1950 SCJ 153 : 5 DLR (SC) 17 : 1950 RLW 139.

Intention of parties.

The intention of the parties must be gathered in the first place from the document itself. If the words are express and clear effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used.

If, however there is ambiguity in the language employed, it is permissible to look into the surrounding circumstances to determine what was intended. (BOSE J.)

Chunchun Jha v. *Ebadat Ali*, 1954 SC 345 : 1955 (1) SCR 174 : 1954 SCJ 469 : 1954 SCA 611 : 1954 Andh LJ 45 : 1954 ALJ 546 : 1954 (1) MLJ 708.

Precedent.

Unless the language of two documents is identical an interpretation placed on one document is no authority for the proposition that a document differently drafted though using partially similar language should be similarly interpreted. (MAHAJAN J.)

Abdulla Ahmed v. *Animendra Kissen*, 1950 SCR 30 : 1950 SC 15 : 1950 SCJ 153 : 1950 RLW 139 : 5 DLR (SC) 17.

Proviso.

A proviso is normally an excepting or qualifying clause and its effect is to except out of the preceding clause upon which it engrafted something which but for the proviso would be within it. Where the circumstances are that the proviso is to be ignored as the contingency contemplated by it does not arise, it is not proper to attempt to spell out of the proviso by implication, something which is not only not in the main provisions but is contradictory to it.

(MUKHERJEA J.)

Angurbala v. *Debabrata*, 1951 SC 293 : 64 LW 960 : 1951 SCR 1125 : BLR 1951 SC 285 : 6 DLR (SC) 273 : 1951 ALJ 132 : (1952) 2 Cal 209.

Sovereign Grant.

The ordinary rule applicable to grants made by a subject does not apply to grants made by Sovereign authority and the latter are to be construed most

favourably for the Sovereign. This general rule, however, is capable of important relaxations in favour of the subject. Thus, if the intention is obvious, a fair and liberal interpretation must be given to the grant to enable it to take effect and the operative part, if plainly expressed, may take effect notwithstanding qualifications in the recitals. In cases where the grant is for consideration it is construed in favour of the grantee for the honour of the Sovereign and where two constructions are possible, one valid and the other void, that which is valid ought to be preferred, for the honour of the Sovereign ought to be more regarded than the Sovereign's profit. (S. K. DAS J.)

Rajendra Chand v. *Mst. Sukhi*, 1956 SCR 889 : 1957 SCA 251 : 1957 SCJ 119 : 1957 SC 286 : (1957) Punj 819.

Surrounding circumstances.

In construing a document whether in English or in vernacular, the fundamental rule is to ascertain the intention from the words used ; the surrounding circumstances are to be considered but that is only for the purpose of finding out the intended meaning of the words actually employed. (MUKHERJEA J.)

Ramgopal v. *Nandlal*, 1951 SC 139 : 64 LW 547 : 1950 SCR 766 : 1950 SCJ 575 : 6DLR (SC) 56 : 1951 ALJ 24 : BLR 1951 SC 134 : 88 CLJ 1.

Unauthorised clause.

Th fact that a clause in a deed is not binding on the ground that it is unauthorised cannot *ipso facto* render the whole deed void unless it forms such an integral part of the transaction as to render it impossible to sever the good from the bad. (VENKATARAMA IYER J.)

Karanpura Development Co. v. *Kamakshya Narain Singh*, 1956 SCR 325 : 1956 SC 446 : 1956 SCA 591 : 1956 SCJ 511 : 35 Pat 573.

Vested or contingent interest.

The determination of the question as to whether the interest created by a deed is vested or contingent has to be guided generally by the principles recognised under sections 19 and 21 of the Transfer of Property Act, 1882 and sections 119 and 120 of the Succession Act, 1925. But the question is really one of intention to be gathered from a comprehensive view of all the terms of the document. (JAGANNADHADAS J.)

Rajes Kanta Roy v. *Shanti Devi*, 1957 SCR 77 : 1957 SC 255 : 1957 SCJ 197: 1957 SCA 440.

DEFENCE OF INDIA ACT, 1939—**S. 19—award of compensation—principles of assessment.**

The principles on which compensation is to be ascertained under the provisions of S. 19 are the same as those given in S. 23 (1) of the Land Acquisition Act. (KAPUR J.)

Haji Mohammed Eckramel Haq v. *State of West Bengal*, 1959 SCJ 443 : 1959 Sup 1 SCR 922 : 1959 SC 488 : 1959 SCA 477.

Section 19 (i) (f)—Appeal against decision.

The decision of a High Court in an appeal under section 19 (i) (f) is not a judgment, decree or order either within the sections 109 and 110 of the Civil Procedure Code or clause 29 of the Letters Patent of the Nagpur High Court (which

corresponds to clause 39 of the Letters Patent of the Calcutta, Madras and Bombay High Courts). Therefore no appeal lies against such a decision.

(VENKATARAMA IYER J.)

Hanskumar Kishinchand v. *Union of India*, 1958 SC 947.

DELEGATED LEGISLATION—**Rules—Scope of.**

There is no obvious reason why the rules framed in exercise of the power delegated by the Legislature should not be regarded as part of the "law" made by the State.

The Bombay Sales-tax Act, 1952 taken by itself did not provide for exclusion from taxation the two categories of sales or purchases excluded by Art. 286 (1) (b) and (2) of the Constitution from legislation by the States. But certain rules made by the State Government by virtue of the rule making power conferred by the Act excluded these two categories in calculating the taxable turnover under the Act and were brought into force simultaneously with the Act.

Held, the sales or purchases excluded by Arts. 286(1)(b), and (2) stood in fact excluded from taxation and the State of Bombay could not be considered to have made a "law imposing or authorising the imposition of a tax" in contravention of Art. 286.

55 Bom LR 246 Reversed. (PATANJALI SASTRI C. J.)

State of Bombay v. *United Motors Limited*, 1953 SC 252 : 1953 SCR 1069 : 1953 SCJ 373 : 1953 SCA 408 : 8 DLR SC 294 : 55 Bom LR 536 : 1953 (1) MLJ 743 : 66 LW 577 : 1953 STC 133.

DISPLACED PERSONS (DEBTS ADJUSTMENT) ACT, 1951—**S. 2 (6).**

The word "debt" in S. 2 (6) includes a mortgage debt. (WANCHOO J.)

Kaushalya Devi v. *Pritam Singh*, 1960 (3) SCR 570 : 1961 (1) SCJ 125 : (1960) 2 Punj 555 : 1960 SC 1030.

DIVORCE ACT, 1869—**S. 14—satisfied on evidence.**

In a suit based on a matrimonial offence it is not necessary and it is indeed rarely possible to prove the issue by any direct evidence, for in very few cases can such proof be obtainable. The question in such cases will be whether on the evidence led the court can be satisfied beyond reasonable doubt that the offence has been committed. The duty of the court is to pronounce a decree if it is so satisfied.

1951 A.C. 391 Ref. to. (KAPUR J.)

Earnist J. White v. *Kathlean O. White*, 1958 SC 441 : 1958 SCR 1410 : 1958 SCA 1108 : 1958 SCJ 839 : 1958 (2) An WR 125 : 1958 (2) MLJ 125 : 1958 MPC 594 : 1958 MLJ (Cri) 631 : 1958 ALJ 671 : 1958 BLJR 714 : 37 Pat 994.

DOMICILE AND CITIZENSHIP.

Citizenship and domicile represent two different conceptions. Citizenship has reference to the political status of a person, and domicile to his civil rights. Domicile has reference to the system of law by which a person is governed. Each area having a distinct set of laws would itself be regarded as a country for the purpose of domicile. There can be different domiciles for different States in India. (VENKATARAMA IYER J.)

Joshi v. *State of Madhya Bharat*, 1955 SCR 1215 : 1955 SC 334 : 1955 SCA 511 : 1955 SCJ 298 : 1955 MWN 406

DURGAH KHAWAJA SAHEB ACT, 1955—**validity.**

S. 5 and the subsidiary sections which deal with the powers of the committee do not violate the fundamental right guaranteed to the denomination under Art 26(c) and (d) of the Constitution. S. 2 (d) (v) and S. 14 do not offend Art 19(1) (f) & (g) of the Constitution.

S. 11(t) and (h) do not offend Article 25(1) of the Constitution.

S. 13(1) does not offend Art 25(1) of the Constitution.

S. 16 and S. 18 do not offend either Art 14 or Art 32 or the two Articles read together.

1959 Raj 177 Reversed. (GAJENDRAGADKAR J.)

Durgah Committee, Ajmer v. *Syed Hussain Ali*, 1961 SC 1402 : 1961 (2) SCA 647.

EASEMENTS—**Fishery rights—lost grant.**

The doctrine of lost grant has no application to the case of inhabitants of particular localities seeking to establish rights of user to some piece of land or water. A right exercisable by a fluctuating and unascertained body of persons who constitute the inhabitants of a village from time to time is neither attached to any estate in land nor is it such a right as can be made the subject of a grant. Such a right can only be acquired by custom.

1950 PC 56 Followed ; 1937 Cal 245 Approved. (MAHAJAN J.)

(*Raja*) *Braja Sundar Deb* v. *Moni Behara*, 1951 SC 247 : 64 LW 987 : 1951 SCR 431 : 1951 SCJ 363 : 6 DLR (SC) 283 : 17 Cut LT 252 : BLR 1951 SC 209 : 30 Pat 871.

EASEMENTS ACT, 1882—**S. 7, ill (i)—right to protect against flood.**

Right of a riparian owner to protect himself against extraordinary floods and to pass flood water received by him on to the lower land.

See *Rudrayya* v. *Venkayya*, 1961 (2) MLJ 186.

S. 17(a).

A right to fish from the fishery based on mere inhabitancy is capable of almost indefinite increase and if the right exists in a body (of persons) which might increase in number, it would necessarily lead to the destruction of the subject matter of the grant. (MAHAJAN J.)

(*Raja*) *Braja Sundar Deb* v. *Moni Behara*, 1951 SC 247 : 64 LW 987 : 1951 SCR 431 : 1951 SCJ 363 : 6 DLR SC 283 : 17 Cut LT 252 : BLR 1951 SC 209 : 30 Pat 871.

S. 17(c)—natural and artificial channels.

In a suit for a perpetual injunction restraining the defendant from obstructing the flow of water into the plaintiff's land from across the defendant's land, the parties proceeded to trial on the definite understanding that the channel through which the water flowed right up from the start upto the end was alleged to be an artificial channel. The High Court in second appeal held, reading the plaint in a very technical manner, that the flow through the defendant's land was through a natural course and that under Section 17 (c) the plaintiff could have acquired no right as alleged by him and dismissed the suit.

Held, (allowing the appeal), it was not open to the High Court to make out

an entirely new case and to hold that the Courts below had completely misjudged the plaintiff's claim. (GAJENDRAGADKAR J.)

Raruha Singh v. *Achal Singh* 1961 SC 1097.

EJECTMENT SUIT—**proof of title by plaintiff.**

In a suit in ejectment it is more important for the plaintiff to establish his own title than to destroy the defendant's title, for a mere destruction of the defendant's title in the absence of establishment of his own title carries the plaintiff nowhere. (JAGANNADHADAS J.)

M. M. B. Catholicos v. *M. P. Athanasius*, 1954 SC 526 : 1955 (1) SCR 520 : 1954 SCJ 736 : 1955 SCA 1354 : 9 DLR SC 337.

Sub-tenant—whether necessary party.

A decree for possession passed against a tenant in a suit for ejectment is binding on a person claiming title under or through the tenant and is executable against such a person whether or not he was a party to the suit. The non-joinder of such a person does not render the decree any the less binding on him. It is in this sense therefore that he is not a necessary party to an ejectment suit against the tenant. Such a person, nevertheless, is a proper party to the suit in order that the question whether the lease has been properly determined and the lessor is entitled to recover possession may be decided in his presence so that he may have the opportunity to see that there is no collusion between the landlord and the tenant under or through whom he claims. (S. R. DAS J.)

M/s. Importers and Manufacturers Ltd. v. *Pheroze Framroze Taraporewalla*, 1953 SC 73 : 8 DLR SC 128 : 1953 SCR 226 : 1953 SCJ 82 : 1953 SCA 271 : 55 Bom LR 271.

Trust suit.

In a suit where the plaintiff claims to be trustee and prays for a declaration of his own title as trustee and for a declaration that the defendant is not the trustee and for possession of the trust property, if the plaintiff is to succeed he must do so on the strength of his own title. (S. R. DAS C.J.)

M. M. B. Catholicos v. *T. Paulo Avira*, 1959 SC 31 : (1958) Ker 1340 : 1958 Ker LT 721 : 1958 KLJ 874.

EQUITY—**statutory provisions.**

Where certain matters have been dealt with by the statute, equitable principles cannot be had recourse to, however fair they may appear to be at first sight. (BOSE J.)

Kedarlal v. *Harilal*, 1952 SC 47 : 1952 SCR 179 : 1952 SCJ 37 : 1952 (1) MLJ 431 : BLR 1952 SC 81 : 1952 MWN 104 : 65 LW 179 : 7 DLR (SC) 133.

ESTOPPEL.

Where a dispute between one B who claimed certain properties by survivorship on the death of his paternal uncle's son, S and one M, the daughter of the said S, who claimed independent title in her, was referred to arbitration and the award granted some properties to B and the rest to M absolutely and both took possession of the same and dealt with them as their own and after the death of B, his son K succeeding to his estate also acquiesced in the arrangement and K died after M and the sons of K sued for recovery of possession from the grandsons of M,

Held, (1) B would be estopped from denying the existence of facts which would give M an absolute interest in the property ;

(2) as B would be estopped K would also be estopped as he stepped into B's shoes much more so as B claimed joint family rights in the property ;

(3) as K was estopped during the life time of M, he continued to be bound by the estoppel after her death even though he assumed a new character when succession opened ;

1918 PC 70 followed ;

(4) as the estoppel against K enured after the death of M, the sons of K who claimed through him would also be estopped. (BOSE J.)

Dhian Singh v. *Jugal Kishore*, 1952 SCR 478 : 1952 SC 145 : 7 DLR SC 113 : 1952 SCJ 142 : 1952 SCA 417 : 1952 ALJ 324 : 90 CLJ 206 : 1952 MWN 528 : (1953) 1 All 225.

Estoppel and Election.

The rule of election is a rule underlying many branches of the law which precludes a person who, with full knowledge of his rights, has once elected to assent to a transaction voidable at his instance and has thus elected not to exercise his rights to avoid it, from going back on that and avoiding it at a later stage. Having made his election, he is bound by it. (BOSE J.)

Sahu Madho Das v. *Mukan Ram*, 1955 (2) SCR 22 : 1955 SC 481 : 1955 SCA 1057 : 1955 SCJ 417 : 1955 (2) MLJ 1 : 1955 MWN 919 : (1955) 2 All 177.

EVACUEE PROPERTY LAWS.

ADMINISTRATION OF EVACUEE PROPERTY ACT, 1950—**S. 2 (f) (1)—transfer.**

Succession to property on death of a person cannot appropriately be described as a mode of transfer within the meaning of the section which obviously contemplates a transfer *inter vivos*. (GHULAM HASAN J.)

Ebrahim Aboobaker v. *Tek Chand Dolwani*, 1953 SC 298 : 1953 SCR 691 : 1953 SCJ 411 : 1954 SCA 1121 : 54 Bom LR 6 : 8 DLR SC 426.

S. 7—discretion of Custodian—interference by High Court.

It is for the Custodian to decide whether on the information in his possession he should issue a notice under S. 7 or not. It is not for the Court exercising jurisdiction under Art. 226 of the Constitution to determine whether such information is adequate to justify the issuing of the notice. (IMAM J.)

Inayat Ullah v. *Custodian, Evacuee Property*, 1958 SC 160 : 1958 SCR 116 : 1958 SCJ 427 : 1958 ALJ 180 : 1958 MPC 139.

Right to copies.

It is a misconception of the entire scheme of the Act to suppose that an enquiry under S. 7 and the issuing of a notice previous to the holding of that enquiry is a single proceeding. There are two stages in the process whereby any property can be declared to be evacuee property under the Act. One is the issuing of the notice to persons interested and the other an enquiry under S. 7.

When issuing a notice, the Custodian merely has some credible information which in his opinion justifies him in issuing it and thereafter he has to enquire into the matter before making the declaration. That information may after the

enquiry has been concluded turn out to be entirely insufficient for making the required declaration.

At the second stage, the enquiry, (and there can be no doubt that the Custodian while holding such enquiry is acting in a judicial capacity) a party to the proceedings would be entitled under rule 35 of the Rules framed under the Act, to copies of the record and the evidence from the stage of the issuing of the notice until conclusion of the enquiry but not previous to the issue of the notice.

Hence a person to whom the notice is issued is not entitled to copies of the materials before the Custodian previous to the issue of the notice.

1955 Madh. Bharat 212 Affirmed. (IMAM J.)

Inayat Ullah v. *Custodian Evacuee Property*, (*ibid*).

Death of person during pendency of proceedings.

Where the person against whom proceedings under S. 7 have been initiated dies before a declaration under the section is made, the proceedings abate and his heirs cannot be deprived of the property which vests in them under law. Thereafter the Custodian General will have no jurisdiction to pass an order under S. 7 declaring the property to be evacuee property. (GHULAM HASAN J.)

Ebrahim Aboobaker v. *Tek Chand Dolwani*, 1953 SC 298 : 1953 SCR 691 : 1953 SCJ 411 : 1954 SCA 1121 : 54 Bom LR 6 : 8 DLR SC 426.

S. 8(2-A) (as amended by Act 1 of 1960)—effect.

Whether the deeming provision of Ordinance XXVII of 1949 or of S. 8(2) of the Act was or was not sufficient to give validity to the vesting under the previous Ordinances which original vesting was bad because of the unconstitutionality of those Ordinances, S. 8(2-A) as introduced into the Act makes such vesting valid. (KAPUR J.)

Azimunnissa v. *Deputy Custodian, Evacuee Properties*, 1961 SC 365.

S. 10 (1) and Rule 10—recovery of mesne profits.

There is nothing in the words "for the purposes of securing, administering, preserving and managing any evacuee property" occurring in S. 10 or in Rule 10, which confers, or from which can be deduced, a power on the Custodian to determine rents and profits or recover rent from a person in lawful possession of evacuee properties, in a summary manner without resorting to the ordinary remedy provided by law, that is, by way of suit. (MUDHOLKAR J.)

Bharoomal v. *Custodian-General, Ev. Property*, 1961 SC 1283.

S. 12—Power of Custodian to cancel lease.

The Custodian has under S. 12 the power and had always the power to cancel leases created not merely by the evacuees but also by himself. The section expressly authorises the Custodian to vary the terms of the lease, and that cannot be reconciled with the contention that it confers no authority on him to go back upon his own contracts.

The operative portion of the section which confers power on the Custodian to cancel a lease or vary the terms thereof is unqualified and absolute, and that power cannot be abridged by reference to the provision that it could be exercised "notwithstanding anything contained in any other law for the time being in force." This provision is obviously intended to repel a possible contention that S. 12

does not by implication repeal statutes conferring rights on lessees, and cannot prevail as against them and has been inserted '*ex abundanti cautela*'.
(VENKATARAMA IYER J.)

Kanwar Raj v. *Pramod*, 1955 (2) SCR 977 : 1956 SC 105 : 1956 SCA 419.

S. 12 & rule 14(6)—power of Custodian-General.

By reason of the proviso to rule 14 (6) the Custodian-General can in exercise of the powers under S. 27 of the Act, cancel an allotment made by a lower authority on or before July 22, 1952. The only limitation on that power is that he must do so in a revision petition filed within the prescribed time which in the context of a revision to the Custodian-General can only mean 60 days or such other time within which the Custodian in his discretion thinks fit to entertain the revision.
(GAJENDRAGADKAR J.)

Purshottamlal v. *Diwan Chaman Lal*, 1961 SC 1371.

S. 18(1)—mendicant-non-proprietor.

The provisions of S. 18 apply to the occupancy rights of a tenant. In the case of a mendicant non-proprietor who just had a right to occupy a village site and build a house which right was heritable and transferable only with the consent of the proprietor, he has no rights in the site such as would make him a tenant of it. Therefore the provisions of S. 18(1) do not apply to the rights of such a person and therefore cannot override the provisions of the *wajib-ul-arz* according to which his right to reside in the house came to an end when he abandoned the village on migrating to Pakistan. (RAGHUBAR DAYAL J.)

Gorkha Ram v. *Custodian General*, 1961 SC 1805.

S. 22(b)—whether discriminatory.

While where in respect of property of a person who is an evacuee within the meaning of S. 2 (d) (iv) an order is made under S. 7 declaring it to be evacuee property, the evacuee or his heir will be entitled to apply for restoration under S.16 and also to the benefit of S. 13 of Displaced Persons Compensation and Rehabilitation Act, 1954, in the case of a person who is an "intending evacuee" within the meaning of S. 2 (e) (i) once a declaration is made under S. 19 that he is an intending evacuee, his property would be liable to be declared evacuee property under S. 22 (b) but he would not get the benefit of the sections above mentioned. This denial of benefits of S. 16 of the Act and S. 13 of the Displaced Persons Act to an "intending evacuee" cannot be said to amount to denial of equal protection of laws, for the two groups of persons are not similarly circumstanced. Hence, S. 22 (b) of the Act does not contravene Art. 14 of the Constitution. (DAS GUPTA J.)

Mohamed Saheb Mahaboob v. *Deputy Custodian-General*, 1961 SC 1657.

S. 22 (b)—Transfer made before declaration.

It is clear that the transfer mentioned shall be one of the circumstances prescribed under Cl. (b) irrespective of whether it took place before or after the declaration as intending evacuee was made. (DAS GUPTA J.)

Mohd. Saheb Mahboob v. *Deputy Custodian-General*, 1961 SC 1657.

S. 24—what orders are appealable.

The section confers a right of appeal against all orders made under section 7 and does not specify the nature of the orders made appealable. The contention

that no appeal lies against an order of the Additional Custodian declining to declare a person an evacuee and that the only order he is entitled to pass under section 7 is an order declaring any property to be evacue property and that it is this order and this order alone which is appealable under section 24 is without force.

In an enquiry under section 7 the first point for adjudication is whether a certain person falls within the definition of the word "evacuee" given in the Ordinance. If he comes within the ambit of the definition, then any property held by him becomes evacuee property. The decision of the Custodian whether in the affirmative or in the negative amounts to an adjudication under section 7. Therefore an order made by the Additional Custodian refusing to declare a person an evacuee and his property evacuee property is an order made under S. 7 and is appealable under S. 24. (MAHAJAN J.)

Ebrahim Aboobakar v. *Custodian General, Evacuee Property*, 1952 SC 319.

Whether one Custodian can appeal against order of another Custodian.

The words "any person aggrieved" in S. 24 can, in the premises only mean a person whose properties have been declared to be evacuee properties by the Custodian or a person who moved the Custodian to get the properties so declared or any other such aggrieved person and cannot include any Custodian as defined in the Act. The Act does not contemplate one Custodian preferring appeals against the orders of another Custodian.

1957 Patna 235 Reversed. (SUBBA RAO J.)

Mohd. Sharfuddin v. *R. P. Singh*, 1961 SC 1312.

S. 26(1), Proviso—Notice when not necessary.

Where the party concerned is already before the Custodian, all that is necessary for the Custodian to do is to inform such party of his intention to examine the records to satisfy himself whether a particular order should be revised and then to give him a reasonable opportunity of being heard. There would be no necessity in such a case to serve a formal notice on such party and therefore an omission to serve the notice can be of no consequence. (DAS GUPTA J.)

Fazal Bhai Dhala v. *Custodian General*, 1961 SC 1397.

S. 27—extent of revisional powers.

Sec. 27 is very wide in its terms and it cannot be contended that the revisional power cannot be exercised when there was an appeal provided but no appeal was filed. The section is not subject to any such limitation nor can the scope of revisional powers be confined only to matters of jurisdiction or illegality.
(JAGANNADHADAS J.)

Indira Sohanlal v. *Custodian of Evacuee Property, Delhi*, 1955 (2) SCR 1117 : 1956 SC 77 : 1956 SCA 618 : 1956 SCJ 171.

Ss. 27 and 58(3)—Retrospective operation.

S. 27 can be given retrospective operation only to the extent permitted by S. 58(3) of the Act. S. 58 (3) does not affect the previous operation of Ordinance XXVII of 1949 which the Act repealed and therefore an order of the Custodian which had become final under the Ordinance cannot be affected retrospectively under S. 58(3) so as to deprive the order of the finality it had acquired under the Ordinance.

9 Lah 284 (PC) Relied on ; (1955) Punj 823 Overruled. (SUBBA RAO J.)

Niranjan Singh v. *Custodian, Evacuee Property, Punjab*, 1961 SC 1425.

S. 27 & Rule 31 (5)—Period prescribed.

The use of the word "ordinarily" in Rule 31 (5) indicates that the period of 60 days is not a period of limitation but only a rule of guidance for the petitioner and for the Custodian-General. It is within the jurisdiction of the Custodian-General to entertain revision petitions after the expiry of 60 days but the Rule indicates to him that the reasonable period for entertaining a revision is 60 days.
(SUBBA RAO J).

Purshottamlal v. *Diwan Chaman Lal*, 1961 SC 1371.

S. 40(4) (a)—"Good faith".

In determining the content of the expression "good faith" in Cl. (a) in the context of the provisions of S. 40 (1), the object and policy of the Act must be borne in mind and the definition in S. 3 (22) of the General Clauses Act cannot be applied.

Hence where a vendor sold his property not for any necessity or any other legitimate purpose but solely with the object of converting it into cash and removing it to Pakistan, that would clearly show an intent to defeat the provisions of the Act, even though the provisions of the Act had not then been extended to the concerned State, but only later, if he knew it would soon be so extended. It cannot be said that he entered into the transaction in "good faith".
(GAJENDRAGADKAR J.)

Rabia Bai v. *Custodian General, Ev. Property*, 1961 SC 1002.

Good faith of vendee—whether material.

The provisions of S. 40 (4) (a) are more rigorous and stringent than those of S. 53 (1) of the Transfer of Property Act in that good faith is required both in the vendor and the vendee for confirmation of a transaction falling under S. 40 (4) (a). (GAJENDRAGADKAR J.)

Rabia Bai v. *Custodian General, Evacuee Property*, (*ibid.*).

Confirmation of transaction—authority of Govt. Press Note.

Whatever may be the nature of circulars and directions issued by the Government of India, the authorities administering the law are to deal with matters brought before them under the relevant provisions of the Act. It cannot be said that even where the Act applied, confirmation of a transaction is intended to be automatic subject to the satisfaction of the two conditions specified in the Press Note dt. 13.5.49 of the Ministry of Rehabilitation.

Rabia Bai v. *Custodian General, Ev. property*, (*ibid*).

BIHAR ADMINISTRATION OF EVACUEE PROPERTY ORDINANCE, 1949—**S. 2(c)—"evacuee".**

A person who migrated to Pakistan from India after 1.3.47 and whose reason for such migration has not been accepted is an "evacuee" within the meaning of the definition. (JAGANNADHADAS J.)

State of Bihar v. *Amarsingh*, 1955 SCR 1259 : 1955 SC 282 : 1955 SCJ 311 : 1955 SCA 376 : 34 Pat 274.

S. 2(d)—"evacuee property".

The words used in the definition of 'evacuee property' in S. 2 (d) are of sufficient amplitude and comprise also *wakf* property and interest therein. (JAGANNADHADAS J.)

State of Bihar v. *Amarsingh*, (*ibid*).

EAST PUNJAB EVACUEES (ADMINISTRATION OF PROPERTY) ACT, 1947, **(as amended by Act 26 of 1948)—S. 5A—validity.**

S. 5A cannot be read as a legislative provision depriving the owner of his property. There can be no doubt that so far as the transactions subsequent to the date of amendment are concerned it is nothing more than a restriction on the transfer of property by the owner thereof. Having regard to the purpose and policy underlying the law relating to evacuee property and the abnormal conditions which arose from and after 15-8-1947, the requirement of confirmation with reference to transactions affecting evacuee property cannot but be considered a reasonable restriction.

The retrospectivity given to the section commencing from 15-8-1947, is also not only reasonable but called for in the circumstances. (JAGANNADHADAS J.)

Sadhu Ram v. *Custodian-General of Evacuee Property*, 1955 (2) SCR 1113 : 1956 SC 43 ; 1956 SCA 70 ; 1956 SCJ 99.

S. 5B—Conclusiveness of order under—effect of Act 31 of 1950.

While a right of appeal in respect of a pending action may conceivably be treated as a substantive right vesting in the litigant on the commencement of the action, no such vested right to obtain a determination with the attribute of finality can be predicated in favour of a litigant on the institution of the action.

By the very terms of S. 5B, finality attaches to it on the making of the order. But it cannot be a vested right. It does not accrue until the determination is in fact made, when alone the right to finality becomes an existing right. Where an application under S. 5A of Act 14 of 1947 is still pending when the Central Act 31 of 1950 came into force, it cannot be contended that the applicant has any vested right as to finality and conclusiveness of the order passed thereon under Sec. 5B of Act 14 of 1947 and that such an order is not open to revision by the Custodian-General under S. 27 of the Central Act 31 of 1950.

9 Lah. 284 (PC) Distinguished. (JAGANNADHADAS J.)

Indira Sohanlal v. *Custodian of Evacuee Property, Delhi*, 1955 (2) SCR 1117 : 1956 SC 77 : 1956 SCA 618 : 1956 SCJ 171.

DISPLACED PERSONS (COMPENSATION AND REHABILITATION) ACT, 1954—**Ss. 19, 12 and 10—Jurisdiction of the authorities under the Central Act XXXI of 1950.**

After the commencement of this Act, the jurisdiction of the various authorities created by the Administration of Evacuee Property Act, 1950 to deal with the allotment and cancellation of allotment of evacuee property ceased, notwithstanding that no managing officer was appointed with respect to properties acquired under the notification dt. 24-3-1955, issued under S. 12.

Hence where, by an order by the Additional Custodian passed under the 1950 Act, before the notification S.R.O. 697 dt. 24.3.55 was issued under S. 12 of the 1954 Act, cancelling an allotment, a certain person had ceased to hold and lost possession of the lands before the said notification, the Deputy Custodian-General cannot, after the notification under the 1954 Act, revise the order cancelling allot-

ment. S. 9 of the 1954 Act, cannot be invoked in such a case, even assuming that the cancellation of allotment was erroneous because what is essential for the applicability of that section is the fact of holding possession of the land on the date of the notification. (MUDHOLKAR J.)

Gopal Singh v. *Custodian Evacuee Property*, 1961 SC 1320.

DISPLACED PERSONS (CLAIMS) SUPPLEMENTARY ACT, 1954—**Rule 5 and** DISPLACED PERSONS (COMPENSATION AND REHABILITATION) ACT, 1954—**Rule 65—Validity.**

These two rules do not violate Article 14 of the Constitution of India. (KAPUR J.)

Makhan Lal Malhotra v. *Union of India*, 1961 SC 392.

EAST PUNJAB REQUISITION OF IMMOVEABLE PROPERTY ACT, 1948 **—S. 5 (3)—awarding of interest.**

It would be legitimate to hold that since section 5(3) specifically makes applicable the provisions of S. 23(1) of the Land Acquisition Act, 1894, to proceedings under the Act, the provisions of S. 23(2) of that Act are by necessary implication excluded. But it will not be reasonable to hold that by the specific application of S. 23(1) of the Land Acquisition Act, the principles underlying the provisions of sections 28 and 34 of that Act are also excluded. It cannot be said that the Act intends to exclude the application of the general rule that when the owner of immoveable property loses possession of it he is entitled to claim interest in place of right to retain possession.

1957 Punj 265 Approved. (GAJENDRAGADKAR J.)

Satinder Singh v. *Umrao Singh*, 1961 SC 908.

EVACUEE INTEREST (SEPARATION) ACT, 1951—**S. 10 Cl. (a)—validity.**

S. 10 Cl. (a) does not contravene Articles 31 and 19(1) (f) of the Constitution. (KAPUR J.)

Azimunnissa v. *Deputy Custodian, Evacuee Properties*, 1961 SC 365.

S. 11—separating evacuee interest.

The object of the Act is not to vest in the Custodian property which is not evacuee property but to vest in him only the evacuee interest in property after determining or separating, as the case may be, that interest from the interests of other persons in such property.

Hence, where after a certain share in certain properties belonging to certain migrants along with others, was declared evacuee property, an order was made under Sec. 11 vesting the entirety of the properties in the Custodian on the ground that, even after notice to separate under S. 6 to the co-sharers, no claim was submitted by any one of them.

Held, the order could not be upheld, for the object of the notice under S. 6 could only be one or other of two things, namely, for determining the evacuee interest or separating the evacuee interest in composite property and therefore the entire property would not vest in pursuance of such an order. (SARKAR J.)

Abdul Hakim Khan v. *Regional Settlement Commissioner-cum-Custodian of Evacuee Property*, 1961 SC 1391.

EVIDENCE ACT, 1872.

Applicability to Tribunals.

The Act has no application to enquiries conducted by Tribunals, even though they may be judicial in character. The law requires that in enquiries, such tribunals should observe rules of natural justice, which, stated broadly, require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by the opponent and that no material should be relied on against him without his being given an opportunity of explaining them. If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence is not strictly followed.

(VENKATARAMA IYER J.)

Union of India v. *T. R. Varma*, 1958 SCR 499 : 1957 SC 882 : 1958 SCA 110 : 1958 SCJ 142 : (1957) 14 FJR 237 : 1958 (1) MLJ 66 : 1958 MPC 61 : 1958 All LJ 126 : 1958 All WR 156 : (1958) Punj 274 : 60 Punj LR 126.

S. 13 [Where the question is.....the existence of any right or custom, the following facts are relevant :—

(a) any transaction by which the right or custom was.....claimed..... asserted.....

(b) particular instances in which.....its exercise was.....asserted.....]

Recitals in a deed.

Recitals in a mortgage deed that the property is the private land of the mortgagor, though it cannot be regarded as an admission by the mortgagee as to the character of the land, as it is not executed by him, is admissible under S. 13 as an assertion of title, and its probative value as against the mortgagee claiming under the document and persons claiming under him will be high.

(VENKATARAMA IYER J.)

Harihar Prasad Singh v. *Deonarain Prasad*, 1956 SCR 1 : 1956 SC 305 : 1956 SCA 316 : 1956 SCJ 279 : 1956 BLJR 306 : 35 Pat 221 : 1956 SCC 124.

Transaction—Judgment.

Where the question was whether the plaintiff was the spiritual collateral of the deceased *mahant*, K from whom the defendant derived his title,

Held, the judgment in a suit filed by K asserting his right as the spiritual collateral of one M through a common ancestor R, who according to the plaintiff was the spiritual ancestor of both himself and K (in which judgment, was set out a pedigree table), was admissible under S. 13, even though it would not be an admission by K relevant under S. 21. (MUKHERJEA J.)

1952 Punjab 301 Reversed.

Sital Das v. *Sant Ram*, 1954 SC 606.

The question was whether the properties in suit were joint family properties or self-acquired properties.

Held, a judgment in a previous suit filed by a female member of the family for maintenance claiming a charge on the properties was admissible in evidence under S. 13 as asserting that the properties in dispute belonged to the joint family, as the amount of maintenance would depend on the extent of the joint family properties and an issue was actually framed on that question, and as there was a prayer that the maintenance should be charged on the joint family properties and it was granted. (VENKATARAMA IYER J.)

Srinivas v. *Narayan*, 1954 SC 379 : 1955 (1) SCR 1 : 1954 SCJ 408 : 1954 SCA 878 : 9 DLR SC 320 : 57 Bom LR 678 : 67 LW 515 : 1954 (1) MLJ 630 : 1954 VLJ 78.

Custom—oral evidence.

Oral evidence as to instances which can be proved by documentary evidence cannot safely be relied upon to establish custom, when no satisfactory explanation for withholding the best kind of evidence is given. (MAHAJAN J.)

Saraswathi Ammal v. *Jagadambal*, 1953 SC 201 : 1953 SCR 939 : 1953 SCJ 287 : 1954 SCA 239 : 8 DLR SC 266 : 1953 (1) MLJ 697 : 1953 AWR 394 : 66 LW 540.

Custom—Judicial instance.

A party setting up a custom must allege and prove the custom on which he relies. It is not any theory of custom or deductions from other customs which can be made a rule of decision but only a custom applicable to the parties concerned that can be the the rule of decision in a particular case. It is well settled that custom cannot be extended by analogy. It must be established inductively and not deductively and it cannot be established by *a priori* methods. A community living in one particular district may have evolved a particular custom. In the absence of evidence that, that custom is applicable to another community in another district, a decision on the peculiar circumstances of the case affirming the existence of the custom in the former community cannot be held to furnish a judicial instance of the custom in the latter community. (MAHAJAN J.)

Saraswathi Ammal v. *Jagadambal*, (*ibid.*).

S. 16, Ill. (b)—presumption as to receipt of letter.

The illustration only means that each of these facts is relevant. It cannot be read as indicating that, without a combination of these two facts (*viz.*, posting of the letter and its not being returned by the Dead Letter Office) no presumption regarding the receipt by a particular person of a letter can arise. Indeed the section with the illustrations has nothing to do with presumptions but only with relevance. (JAGANNADHADAS J.)

Mobarik Ali Ahmed v. *State of Bombay*, 1958 SCR 328 : 1957 SC 857 : 1958 SCJ 111 : 1957 Cr LJ 1346 : 1958 MLJ 42 (Cr) : 1958 All WR 112 : 1958 SCA 665 : 61 Bom LR 58.

S. 21—Admission—whether conclusive.

An admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel.

Before the rule "what a party himself admits to be true may reasonably be presumed to be so" can be invoked, it must be shown that there is a clear and unambigous statement by the opponent, such as will be conclusive unless explained. (VENKATARAMA IYER J.)

Nagubai v. *Shama Rao*, 1956 SCR 451 : 1956 SC 593 : 1956 SCA 959 : 1956 SCJ 955 : 1956 SCC 321 : (1956) Mys 152 : 1956 An LT 1029.

An admission is not conclusive proof of the matter admitted, though it may, in certain circumstances, operate as an estoppel. (S. K. DAS J.)

K. S. Srinivasan v. *Union of India*, 1958 SCR 1295 : (1958) Punj 1400 : 1958 SC 419 : 1958 SCA 544 : 1958 SCJ 777.

When presumption is inapplicable.

Admissions are not conclusive and unless they constitute estoppel, the maker is at liberty to prove that they were mistaken or untrue. Admissions are mere pieces of evidence and if the truth of the matter is known to both parties the principle that what a party himself admits to be true may reasonably be presumed to be so and that until the presumption is rebutted, the fact admitted must be taken to be established will be inapplicable. (KAPUR J.)

Kishorilal v. *Mt. Chaltibai*, 1959 SC 504.

Admission—splitting up.

It is settled law that an admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him. It must be used either as a whole or not at all. (MAHAJAN J.)

Hanumant Govind Nargundkar v. *State of Madhya Pradesh*, 1952 SC 343 : 1952 SCR 1091 : 1952 SCJ 509 : 1952 (2) MLJ 631 : 7 DLR SC 407 : 1952 SCA 623 : 1953 MWN 347 : 54 Cr LJ 129 : BLR 1952 SC 366 : 1952 AWR (Sup) 109.

S. 32 [Statements, written or verbal, of relevant facts made by a person who is dead..... are.....relevant in the following cases :—

.....

(2) when the statement.....consists of any entry.....made by him in books kept.....in the discharge of professional duty ;

.....

(6) when the statement relates to.....relationship.....between persons deceased.....made in.....family pedigree,.....before the question in dispute was raised.]

Clauses (2) and (6)—entries in tables kept by professional genealogists.

Pedigree tables systematically maintained by professional genealogists of the community are considered important because questions of marriage (who may marry whom) and relationship and caste turn on them. Statements are not therefore lightly made in such cases.

Where the question is the relationship between two persons, entries made by deceased persons in such properly kept genealogical records coming from proper custody are admissible in evidence under section 32 (6), where such entries were written before the dispute arose. Even when they are not shown to have been made before the dispute arose, they will be admissible under S. 32 (2), as under that section, it is enough if the entry was made in the ordinary course of business and it does not impose the limitation that the entry should have been made before the dispute arose.

The question of weight to be attached to these records in a given case is for the courts of fact to determine. (BOSE J.)

Sitaji v. *Bijendra Narain*, 1954 SC 601.

Cl. (5)—Statement by a number of persons—some alone dead—admissibility.

A joint statement made by more persons than one, some of whom alone are dead and others alive, is admissible under S. 32(5), for, it is as much the statement of persons dead as of those alive.

26 Cal 236 Approved ; 1952 Orissa 75 Affirmed. (S. K. DAS J.)

Dolgobinda v. *Nimai Charan*, 1960 SCJ 879 : 1959 SC 914 : 1959 Sup 2 SCR 814 : 1960 (1) SCA 39 : 26 Cut LT 130.

S. 34—Loose sheets of papers.

Loose sheets of papers containing accounts or almanac entries with blanks left at different places have not the probative force of a book regularly kept in the course of business, having regard to the fact that sheets and entries could be substituted or interpolated at different places, if one were so minded. (KANIA C. J.)

Mahasay Ganesh Prasad Ray v. *Narendra Nath Sen*, 1953 SC 431 : 1951 Ker LT 28 : 17 CLT 73.

S. 35—*Riwaj-i-am* of 1913 of Gurdaspur Dt., Punjab.

Though there is an initial presumption in favour of their correctness, the statements in a *Riwaj-i-am*, the truth of which is doubted by the compiler himself and which have been discredited in judicial proceedings and held to be incorrect cannot be regarded as reliable or trustworthy and cannot displace the initial presumption of the general custom, recorded in Rattingan's book so as to shift the onus.

Case law discussed. (S. R. DAS. J.)

Salig Ram v. *Mt. Maya Devi*, 1955 SCR 1191 : 1955 SC 266 : 1955 SCJ 248 : 1955 SCA 332 : 57 Pun LR 247 : (1955) Punj 167.

Entries in Inam registers.

Where actual and authentic evidence is not available as regards the nature and quantum of rights of persons in certain lands, informations set forth in the Inam register are of utmost importance as part of the history of the property. (HIDAYATULLAH J.)

Narayan v. *Gopal*, 1960 (1) SCR 773 : 1960 SC 100 : 1960 SCJ 263 : 1960 (2) SCA 153.

Judgment of Criminal Court.

Where in probate proceedings the question was, whether the legatee had murdered the testator and therefore, the bequest in his favour was affected, the judgment of the criminal court in the case in which the legatee was convicted for murder of the testator will be relevant to show that there was a trial but is not evidence of the fact that the legatee was the murderer. That question must be decided on evidence to be adduced in probate proceedings. (SINHA J.)

Anil Behari Ghosh v. *Latika Bala Dasi*, 1955 (2) SCR 270 : 1955 SC 566 : 1955 SCA 1026 : 1955 SCJ 578 : 1955 (2) MLJ 84 : 1955 MWN 852.

Opinion of the Deputy-Registrar of Co-operative Societies.

The opinion given by the Deputy-Registrar of Co-operative societies in an order for payment against the Managing Director of a co-operative institution where the liability was, *inter alia*, based on a breach of trust, cannot be used in evidence to prove the nature of the liability that it is an *avyavaharika* debt, in a suit by the sons challenging the sale of coparcenary property in execution of that payment order against their father. The order is not admissible in evidence to prove the truth of the facts stated therein, and, except to prove the existence of the judgment itself, it will not be admissible in evidence. (KAPUR J.)

S. M. Jakati v. *S. M. Borkar*, 1959 SCR 1384 : 1959 SC 282 : 1959 SCJ 719 : 61 Bom LR 688 : 1959 CLJ 81 : 1959 (2) MLJ 21.

S. 45—Typed document.

The opinion of an expert that a particu lar document was typed on a particular typewriter does not fall within the ambit of S. 45 and is inadm iss ible in evidence. (MAHAJAN J.)

Hanumant Govind Nargundkar v. *State of Madhya Pradesh*, 1952 SC 343 : 1952 SCR 1091 : 1952 SCJ 509 : 1952 (2) MLJ 631 : 7 DLR SC 407 : 1952 SCA 623 : 1953 MWN 347 : 54 Cr LJ 129 : BLR 1952 SC 366 : 1952 AWR (Sup) 109.

Nautical assessors.

The function of nautical assessors is to advise the Court upon nautical matters. But the decision of the case, however, rests entirely with the Court and even in purely nautical matters, the Court is not bound to follow their advice ; but some reason should be given for disregarding their advice. (S. K. DAS J.)

Asiatic Steam Navigation Co. v. *Arabinda*, 1959 SC 597.

S. 50 [When the Court has to form an opinion as to.....relationship....., the opinion, expressed by conduct, as to .....such relationship, of any person who, ...has special means of knowledge.....is.....relevant.....]

Opinion by a member of the family.

A member of a family can speak in the witness box what he has been told and what he has learned about his ancestors, provided that it is an expression of his own independent opinion (even though it is based on hearsay derived from deceased persons) and is not merely repetition of the hearsay opinion of others and provided the opinion is expressed by conduct. Personal knowledge is not necessary in these cases. His sources of information, and the time at which he acquired the knowledge, (for example, whether before the dispute or not) would affect its weight but not its admissibility. (BOSE J.)

Sitaji v. *Bijendra Narain*, 1954 SC 601.

Conduct—how may be proved.

It is only "opinion as expressed by conduct" which is made relevent under S. 50. The offered item of evidence is the "conduct", but what is made admissible in evidence is the "opinion", the opinion as expressed by such conduct. The immediate effect of the offered item of evidence is only to move the Court to see if this conduct establishes any "opinion" of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the Court to infer the "opinion", the conduct must be of such a tenor which cannot well be supposed to have been willed without the inner existence of the "opinion".

Observation at p. 309 in (1942) 2 Cal 299 Approved.

As the offered item of evidence is the conduct, if that conduct or outward behaviour relates to something that can be seen it must be proved by the person who saw it, if it is something which can be heard, it must be proved by the person who heard it and so on.

The conduct must be of the person who fulfills the conditions of S. 50. But it is not necessary that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct as an external perceptible fact may be proved either by the testimony of the person himself or by some other person, who is acquainted with the facts which express such opinion.

Observation in 19 Mad 9 (at p. 11) that S. 50 seems to imply that the conduct of the person whose opinion is evidence may be proved by others only when he is dead or cannot be called etc., Not Approved. (S. K. DAS J.)

Dolgobinda v. *Nimai Charan*, 1960 SCJ 879 : 1959 SC 914 : 1959 Sup 2 SCR 814 : 1960 (1) SCA 39 : 26 Cut LT 130.

S. 57—Proof of custom.

When a custom or usage, whether in regard to a tenure, or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without necessity of proof in each individual case.

45 Ind. App. 148 Relied on. (SARKAR J.)

Ujagar Singh v. *Mst. Jeo*, 1959 SC 1041 : 1960 SCJ 16 : 1959 Sup 2 SCR 781 : (1959) Punj. 1735.

S. 65 [Secondary evidence may be given of the existence.....of a document ..... :—(a) when the original is shown.....to be in the possession..... of the person against whom the document is sought to be proved.....and when, after notice.....such person does not produce it.]

Certified copy.

A certified copy of a Government record furnishing proof of the fact that there was a contract in writing to transfer by way of lease is reliable secondary evidence when the original in the possession of the plaintiff is not produced in spite of notice under S. 66. (MAHAJAN J.)

Maneklal Mansukhbai v. *Ginwalla*, 1950 SCR 75 : 1950 SC 1 : 1950 SCJ 317 : 5 DLR (SC) 11 : 1950 (2) MLJ 344 : 63 LW 495 : 52 Bom LR 521 : 1950 RLW 117.

S. 67 [If a document is alleged to be signed, or to have been written.....by any person, the signature or handwriting.....must be proved.....]

Conclusions on a comparison of handwriting.

Conclusions based on mere comparison of handwriting must, at best, be indecisive and yield to the positive evidence in the case.
(VENKATARAMA IYER J.)

Kishore Chandra Singh v. *Ganesh Prasad Bhagat*, 1954 SC 316 : 1954 SCR 919 : 1954 SCJ 395 : 1954 SCA 979 : 9 DLR SC 257 : 1954 (1) MLJ 622 : (1954) Pat 313.

Circumstantial evidence.

The manner in which the signature of a person should be proved is prescribed in sections 45 and 47, but even assuming that a signature can be legally held to be proved in a given case on circumstantial evidence, the principle which governs the appreciation of such evidence is that, only if the court is satisfied that the circumstantial evidence irresistibly leads to the inference that the person must have signed the document the Court can legitimately reach such a conclusion.
(GAJENDRAGADKAR J.)

Baburam v. *Smt. Prasanni*, 1959 SCR 1403 : 1959 SC 93 : 1959 SCJ 42 : 16 Elec LR 450 : (1959) Punj 295.

Genuineness of a document—proof of.

The proof of the genuineness of a document is the proof of the authorship of the document and is proof of a fact like that of any other fact. The evidence relating thereto may be either direct or circumstantial. It may consist of direct evidence of a person, who saw the document being written or the signature being affixed. It may be proof of the handwriting of the contents or of the signature by one of the modes provided in Sections 45 and 47. It may also be proved by internal evidence afforded by the contents of the document. This last mode of proof by the contents may be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links which are proved to the satisfaction of the Court. In such a situation, the person who is the recipient of the document, be it either a letter or a telegram, would be in a reasonably good position both with reference to his prior knowledge of the writing or the signature of the alleged sender, limited though it may be, as also his knowledge of the subject matter of the chain of correspondence to speak to its authorship.

In an appropriate case the Court may also be in a position to judge whether the document constitutes a genuine link in the chain of correspondence and thus to determine its authorship. (JAGANNADHADAS J.)

Mobarik Ali Ahmed v. *State of Bombay*, 1957 SC 857 : 1958 SCJ 111 : 1957 Cri LJ 1346 : 1958 MLJ (Cr.) 42 : 1958 All WR 112.

S. 68 [If a document is required by law to be attested, it shall not be.....evidence until one attesting witness at least has been called for.....proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.]

"Called as a witness".

The testator had admitted execution of will and acknowledged his signature before the Sub Registrar in the presence of two persons who identified him before the Sub Registrar and appended their signatures at the foot of the endorsement of registration.

The propounder of the will, on failure to prove the execution and attestation of the will otherwise, contended that the signatures of the identifying witnesses were enough to prove the due attestation. But these witnesses had not been called as witnesses.

Held, it cannot be presumed from the mere signatures that the identifying witnesses had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses. The provisions of S. 68 should have been complied with in order that they could be treated as attesting witnesses. (BHAGWATI J.)

Girja Datt v. *Gangotri Datt*, 1955 SC 346.

S. 79—presumption as to certified copy.

Where a *patwari* issues a certified copy of a *Khataum* without following the prescribed procedure or making a note of the payment of the prescribed fee, the Court is not bound to draw a presumption as to its genuineness. (SUBBA RAO J.)

Bhinka v. *Charan Singh*, 1959 SC 960 : 1959 Sup 2 SCR 798 : 1960 SCJ 892 : 1959 ALJ 557 : 1959 All WR 440.

S. 88 [The Court may presume that a message, forwarded from a telegraph office..... corresponds with a message delivered for transmission, but.....shall not make any presumption as to the person by whom such message was delivered.....]

Presumption as to sender.

Under S. 88, no presumption shall be made as to the person by whom the message was sent. When there is no evidence that it was a particular person, who sent it and that person denies having sent it, the telegraphic message must be held to be not proved. (VENKATARAMA IYER J.)

Kishore Chandra Singh v. *Ganesh Prasad Bhagat*, 1954 SC 316 : 1954 SCR 919 : 1954 SCJ 395 : 1954 SCA 979 : 9 DLR SC 257 : 1954 (1) MLJ 622 : (1954) Pat. 313.

Proof of the authorship.

Under Sec. 88 there is a presumption only that the message (telegram) received by the addressee corresponds with the message delivered for transmission at the office of origin. There is no presumption as to the person who delivered such a message for transmission. But proof of the authorship of the message need not be direct and may be circumstantial as in the case of letters. The contents of the messages received in the context of the chain of correspondence may well furnish proof of the authorship of the messages at the dispatching end.
(JAGANNADHADAS J.)

Mobarik Ali Ahmed v. *State of Bombay*, 1957 SCJ 111 : 1957 SC 857 : 1958 All WR 112.

S. 90 [When any document, purporting or proved to be thirty years old, is produced..... the Court may presume that the signature .....which purports to be in the handwriting of any particular person, is in that person's handwriting.....]

Presumption whether applies to copies.

The presumption enacted in the section can be raised only with reference to original documents and not to copies thereof.

62 Ind. App. 180 Relied on. (VENKATARAMA IYER J.)

Harihar Prasad Singh v. *Deonarain Prasad*, 1956 SCR 1 : 1956 SC 305 : 1956 SCA 316 : 1956 SCJ 279 : 1956 BLJR 306 : 35 Pat 225 : 1956 SCC 124.

The language of S. 90 requires the production of the particular document in regard to which the Court is invited to make the statutory presumption. If the document produced is a copy admissible as secondary evidence under section 65, produced from proper custody and 30 years old, then only the signatures authenticating the copy may be presumed to be genuine ; but production of a copy is not sufficient to raise the presumption of due execution of the original.
(MUKHERJEA J.)

Sital Das v. *Sant Ram*, 1954 SC 606.

Document signed by agent.

Where a document (otherwise satisfying the requirements of the section) purports to be signed by a person as the agent of another against whom the presumption under the section is sought to be raised and there is no proof that he was an agent, S. 90 does not authorise the raising of a presumption as to the existence of authority on the part of the agent to represent that principal.
(VENKATARAMA IYER J.)

Harihar Prasad Singh v. *Deonarain Prasad*, 1956 SCR 1 : 1956 SC 305 : 1956 SCA 316 ; 1956 SCJ 279 ; 1956 BLJR 306 ; 35 Pat 225 ; 1956 SCC 124.

S. 91 [When the terms of a contract or.....disposition of property have been reduced to the form a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms.....except the document itself, or secondary evidence of its contents.....]

S. 92 [When the terms of any such contract.....or any matter.....have been proved according to the last section, no evidence of any oral agreement.....shall be admitted, as between the parties to any such instrument or their representatives-in-interest, for.....contradicting, varying.....its terms.]

Ss. 91 and 92—distinction.

Sections 91 and 92 in effect supplement each other. S. 91 would be frustrated without the aid of section 92 and S. 92 will be inoperative without the aid of S. 91. It is after the document has been produced to prove its terms under S. 91 that the provisions of S. 92 come into operation for the prupose of excluding certain evidence.

S. 91 applies to all documents whether they purport to dispose of rights or not whereas S. 92 applies to documents which can be described as dispositive. S. 91 applies to documents which are both unilateral and bi-lateral unlike S. 92 the operation of which is confined only to bilateral documents. S. 91 lays down the rule of universal application and is not confined to executant or executants of the document ; S. 92 on the other hand applies only between the parties to the documents or their reprsentatives in interest. That S. 92 does not apply to strangers is made clear by the provisions of S. 99 itself. (GAJENDRAGADKAR J.)

Hira Devi v. *Official Assignee, Bombay*, 1958 SC 448 : 1958 SCR 1384 : 1959 SCA 136 : 1958 SCJ 766 ; 1958 (2) An WR 108 : 60 Bom LR 932 : 1958 (2) MLJ 108.

Applicability to proceedings to set aside transfers by insolvents.

The rule of exclusion enunciated by S. 92 applies to both parties to the document and is based on the doctrine of mutuality. Therefore if the terms of any transfer reduced to writing are in dispute between a stranger to a document and a party to it or his representative-in-interest (or between strangers to the document) the restriction imposed by S. 92 is inapplicable, and both the stranger and the party or his representative-in-interest are at liberty to lead evidence of an oral agreement, notwithstanding the fact that such evidence, if believed, may contradict, vary, add to or subtract from its terms.

Phipson on Evidence 9th edn. page 602 Relied on.

When the Official Assignee applies under S. 55 of the Presidency Towns Insolvency Act (or the Official Receiver applies under sections 53 and 54 of the Provincial Insolvency Act), he does so for the benefit of the creditors and not for and on behalf of the insolvent at all and therefore, does not act as a representative-in-interest of the insolvent.

Hence where in a proceeding by the Official Assignee to set aside a gift made by an insolvent, the transferee pleads that though the document purported to be a gift it was really a transaction supported by valuable consideration, he will not be precluded from leading evidence of an oral agreement in support of his plea.

1955 Bombay 122 Reversed. (GAJENDRAGADKAR J.)

Hira Devi v. *Official Assignee, Bombay*, (*ibid*).

S. 99 [Persons who are not parties to a document.....may give evidence of..... a contemporaneous agreement varying the terms.....]

"varying"—Third party's right.

Though it is only varying which is specifically mentioned in the section, there can be no doubt that it includes the third party's right to lead evidence not only to vary the terms of the document but to contradict the said terms or add to or subtract from them. (GAJENDRAGADKAR J.)

Hira Devi v. *Official Assignee, Bombay*, 1958 SC 448 : 1959 SCA 136 : 1958 SCJ 766 : 1958 (2) An WR 108 : 60 Bom LR 932 : 1958 (2) MLJ 108 : 1958 SCR 1384.

Ss. 101 to 103—production of accounts.

Where in a suit on accounts, the facts found lead to an inference that the defendant is maintaining accounts in which is likely to be found an entry for the suit amount, the defendant cannot be allowed to urge that it was no part of his duty to produce his accounts unless called upon to do so and that the onus rests on the plaintiff to prove his case.

44 Ind. App. 98 and 1929 P.C. 95 Referred to. (MAHAJAN J.)

Hiralal v. *Badkulal*, 1953 SC 225 : 1953 SCR 758 : 1953 SCJ 315 : 1953 SCA 499 : 8 DLR SC 432 : 1953 (1) MLJ 725 : 66 LW 545.

Declaratory suit.

In a suit for a declaration that the property in the possession of the defendant is *wakf* property of which he is the *mutawalli*, the plaintiff must show that the property is *wakf* property. (BOSE J.)

Muhammad Shah v. *Fasihuddin Ansari*, 1956 SC 713.

Claim suits.

The burden of proof is heavy on a plaintiff who sues for a declaration of a document solemnly executed and registered, as a fictitious transaction. The burden becomes doubly heavy when he seeks to set aside an order passed after due enquiry by the executing Court upholding the claim of a third party to a property sought to be proceeded against in execution.

1954 Orissa 198 Reversed. (SINHA J.)

Paras Nath Thakur v. *Smt. Mohani Dasi*, 1959 SC 1204 : 1960 (1) SCR 271 : 26 Cut LT. 1 : 1961(1) SCJ 181.

S. 112 [The fact that any person was born during the continuance of a valid marriage between his mother and any man,.....shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties.....had no access..... at any time when he could have been begotten.]

Proof of non-access.

Non-access can be established not merely by positive or direct evidence. It can be proved undoubtedly like any other physical fact by evidence, either direct or circumstantial, relevant to the issue, though it is necessary that proof of non-access must be clear and satisfactory.

The English rule, according to which neither a husband nor a wife is permitted to give evidence of non-access after marriage, to bastardise a child born in lawful wed-lock does not apply to a legitimacy proceeding in India. (MUKHERJEA J.)]

C. Venkateswaralu v. *C. Venkatanarayana*, 1954 SC 176 : 1954 SCR 424 : 1954 SCJ 84 : 9 DLR SC 108 : 1954 (1) MLJ 152 : 1954 MWN 186 : 1954 Andh LJ SC 23.

S. 114—Continuous cohabitation.

Continuous cohabitation by a man and a woman as husband and wife for a number of years and their being treated as such, may raise a presumption of marriage. But the presumption is rebuttable and if there are circumstances which weaken or destroy the presumption, the court cannot ignore them.

On the facts of the case, *held*, such circumstances were not wanting and that their cumulative effect warranted the conclusion that the plaintiff had failed to prove the factum of marriage.

1949 EP 35 Affirmed. (FAZL ALI J.)

Gokalchand v. *Parvin Kumari*, 1952 SC 231 : 1952 SCR 825 : 1952 SCJ 331 : 90 CLJ 73 : BLR 1952 SC 265 : 7 DLR SC 360 : 1952 SCA 610.

Privileged documents.

No inference can be drawn under S. 114 against the State on failure to produce a document in respect of which its claim for privilege under S. 123 is upheld. (GAJENDRAGADAKAR J.)

State of Punjab v. *Sukhdev Singh*, 1961 SC 493.

Ancestral land—Devolution by descent—inference of custom in Punjab.

Where the whole of the land which was once owned by the common ancestor was at the time of the regular settlement, in possession of his descendants according to ancestral shares and where it has not been suggested that any of his descendants acquired the land by purchase or introduced strangers in it by selling any portion of their ancestral holding, an inference can be drawn from the circumstance of equality of holdings and the reference to these in terms of ancestral shares, that the land had devolved on the descendants by descent from the common ancestor. (MAHAJAN C. J.)

Seva Singh v. *Jangir Singh*, 1956 SC 1 : (1955) Patiala 36.

S.115—Estoppel when arises.

Before an estoppel can arise there must be, first, a representation of an existing fact as distinct from a mere promise *de facto* made by one party to the other, second, the other party believing it must have been induced to act on the faith of it, and third he must have so acted to his detriment. (BOSE J.)

Dhiyan Singh v. *Jugal Kishore*, 1952 SCR 478 : 1952 SC 145 : 7 DLR SC 173 : 1952 SCJ 142 : 1952 SCA 417 : 1952 ALJ 324 : 90 CLJ 206 : 1952 MWN 528 : (1953) I All 225.

Adoption—Both parties aware of true facts.

The correct rule of estoppel applicable to cases of adoption is that it does not confer status. It shuts out the mouths of certain persons, if they try to deny the adoption, but when both parties are equally conversant with the true state of facts, this doctrine has no application. (KAPUR J.)

Kishorilal v. *Chaltibai*, 1959 Sup 1 SCR 698 : 1959 SCJ 560 : 1959 SC 504.

Representation and agreement.

Even though a matter may have passed from the stage of a mere representation into an agreement, there are cases, where the courts are entitled to entertain a plea of estoppel in order to prevent fraud or circuity in action. In such cases the injured party need not necessarily be left to an action for breach of contract.
(BHAGWATI J.)

Sunderabai v. *Devaji Shankar Deshpande*, 1954 SC 82 : 1953 SCJ 693 : 1953 (2) MLJ 782.

Abandonment.

Two things are clear, namely (1) that abandonment of a right is much more than a mere waiver, acquiescence or laches and is something akin to estoppel if not estoppel itself and (2) that mere waiver, acquiescence or laches which is short of abandonment or estoppel does not take away vested rights.

When the facts on record were not sufficient to sustain a plea of waiver, acquiescence or estoppel, *held*, a plea of abandonment which is an aggravated form of waiver, acquiescence or laches and akin to estoppel could not be sustained on the self-same facts.

(1950) Mad 339 Reversed. (S. R. DAS J.)

(*Note* :—BOSE J. who delivered a separate concurring judgment preferred to rest his decision on the basis that the facts of the case were not sufficient to found a plea of estoppel : Ed.)

Sha Mulchand & Co. v. *Jawahar Mills Ltd.*, 1953 SC 98 : 1953 SCJ 68 : 1953 SCR 351 : 1953 (1) MLJ 364 : 1953 MWN 319 : 1953 SCA 987.

S. 123—affairs of State—documents relating to commercial activities of State.

It may be that when the Act was passed the concept of Governmental functions and their extent was limited and so was the concept of the words "affairs of State" correspondingly limited. But words are not static vehicles of ideas or concepts. The inevitable consequence of the change in the concept of the functions of the State is that the State in pursuance of its welfare activities undertakes to an increasing extent activities which were formerly treated as purely commercial and documents in relation to such activities are also apt to claim the privilege of documents relating to affairs of State. The question whether any particular document or a class of documents answers the description of documents relating to affairs of State must be determined in each case on the relevant facts and circumstances adduced before the court. (GAJENDRAGADKAR J.)

State of Punjab v. *Sukhdev Singh*, 1961 SC 493.

Document relating to affairs of State.

A representation made by a public servant who was removed from service was considered by the Council of ministers which invited the advice of the Public Service Commission. On receipt of the report of the Commission the views on the merits of the representation were expressed by members of the Council and recorded in the minutes of the proceedings. Thereafter final orders were passed on the representation.

In a suit filed the public servant against the State for a declaration that his dismissal was illegal and for other reliefs, the plaintiff applied for a direction to the State for the production of (a) original orders passed by the cabinet and (b) the advice tendered by the Public Service Commission. The State claimed privilege under S. 123.

Held (upholding the claim for privilege),

1. Documents of class (a) would embody the minutes the meetings of the Council and would indicate the advice which the Council ultimately gave to the Rajpramukh and such advice given to the Rajpramukh is expressly saved by Art 163(3) of the Constitution and

2. The report received by the Council from the Public Service Commission carried on its face the character of a document the disclosure of which would lead to injury to public interest and was a document "which on grounds of public interest must as a class be withheld from production."

1960 Punj 407 Reversed. (GAJENDRAGADKAR J.)

State of Punjab v. *Sukhdev Singh*, (*ibid.*).

Privilege—when should be claimed.

It is well settled that the privilege under S. 123 should not be claimed because it is apprehended that the document, if produced, would defeat the defence raised by the State. The effect of the document on the ultimate course of the litigation or its impact on the head of the department of Government concerned or the Minister in charge of it or even the Government in power has no relevance in making the claim for privilege. The apprehension that the disclosure might adversely affect the head of the department or the department itself or the minister or even the Government or that it may provoke public criticism or censure in the legislature has also no relevance in the matter and should not weigh in the mind of the head of the department who makes the claim. The sole test which should determine the decision of the head of the department is injury to public interest and nothing else. (GAJENDRAGADKAR J.)

State of Punjab v. *Sukhdev Singh*, (*ibid.*).

Procedure in claiming privilege.

The privilege under the section should be claimed generally by the Minister in charge who is the political head of the department or, if not, the Secretary of the Department should make the claim. The claim should always be made in the form of an affidavit. It should show that each document has been read and considered carefully and that the person making the affidavit is satisfied that its disclosure will lead to public injury. If there are a series of documents included in a file it should appear from the affidavit that each document whose disclosure is objected to has been duly considered by the authority concerned. The affidavit should also indicate briefly within permissible limits the reason why it is apprehended that the disclosure will lead to injury to public interest. This last requirement is very important when privilege is claimed in regard to documents which *prima facie* suggest that they are documents of a commercial character having relation only to commercial activities of the State.

If the affidavit in support of the claim for privilege is found to be unsatisfactory a better affidavit may be called for. When the affidavit is made by the Secretary of the department, the Court may, in a proper case, require an affidavit of the minister himself. In a proper case the person making the affidavit, whether he is the secretary or a Minister, should be summoned to face cross examination on the relevant points. It will be open to the opponent to put such relevant and permissible questions as he may think of to help the Court in determining whether the document belongs to the privileged class or not. The scope of the enquiry in such a case is no doubt narrow and restricted but the existence of the power in the Court to hold such an enquiry will itself act as a salutary check on the capricious exercise of the power conferred under S. 123.

(GAJENDRAGADKAR J.)

State of Punjab v. *Sukhdev Singh*, (*ibid.*).

S. 123 & S. 162—Jurisdiction of court where privilege is claimed.

Reading the two sections together, the Court cannot hold an enquiry into the possible injury to the public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide, but the Court is competent and, indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production and that necessarily involves an enquiry into the question whether the evidence relates to an "affair of State" under S. 123 or not.

In this enquiry the Court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to affairs of State it should leave it to the Head of the Department to decide whether he should permit its production or not.

The position in India in regard to the Court's power and jurisdiction in this respect is thus different from the position under the English law as it obtained in England in 1872.

Case law discussed. (GAJENDRAGADKAR J.)

State of Punjab v *Sukhdev Singh*, (*ibid.*).

Discretion of the Head of the Department.

In exercising the discretion under S. 123 in many cases the Head of the Department may have to weigh the pros and cons of the problem and objectively determine the nature and extent of the injury to public interest as against the injury to the administration of justice. That is why it may reasonbly be held that the section gives discretion to the head of the department to permit production of a document even though its production may theoretically lead to some kind of injury to public interest. (GAJENDRAGADKAR J.)

State of Punjab v *Sukhdev Singh*, (*ibid.*).

S. 137—non-cross-examination.

When there is no record in the deposition of a witness that there was no cross-examination, it cannot be inferred from that fact that the request of a party to cross-examine was disallowed. (VENKATARAMA IYER J.)

Union of India v. *T . R . Varma*, 1958 SCR 499 : 1957 SC 882 : 1958 SCA 110 : 1958 SCJ 142 : (1957) 14 FJR 237 : 1958 (1) MLJ 66 : 1958 MPC 61 : 1958 ALJ 126 : 1958 All WR 156 : (1958) Punj 274 : 60 Punj LR 126.

S. 145 [A witness may be cross-examined as to previous statements made by him in writing..... ; but.....to contradict him.....his attention must, before the writing can be proved, be called to those parts.....to be used for.....contradicting him.]

"attention must be called".

All that is required by S. 145 is that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradictions after his attention has been drawn to them in a fair and reasonable manner. The matter is one of substance and not of mere form. (BOSE J.)

Bhagwan Singh v. *State of Punjab*, 1952 SC 214 : 1952 SCR 812 : 1952 SCJ 284 : 1952 (1) MLJ 816 : 1952 MWN 533 : 1952 Cr LJ 1131 : BLR 1952 SC 248 : 65 LW 1223 : 7 DLR SC 322 : 1952 SCA 513 : 1952 AWR (Sup) 92.

S. 157 [In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place,..... may be proved.]

Statement—Communication whether necessary.

The word "statement" used in section 157 means something that is stated and the element of communication to another person is not necessary before that "something that is stated" becomes a "statement" under the section.

Therefore, notes made by a witness of a conversation that took place between him and someone else will be admissible under S. 157 to corroborate his testimony as to what took place at the time. (WANCHOO J.)

Bhogilal Chunilal Pandya v. *State of Bombay*, 1959 Sup 1 SCR 310 : 1959 SC 356 : 1959 SCJ 240 : 1959 Cr LJ 389 : 61 Bom LR 746 : 1959 (1) An WR 101 : 1959 (1) MLJ 101 : 1959 All WR 156.

S. 162—Matters of State.

The words "matters of State" referred to in the second clause are identical with "affairs of State" mentioned in S. 123. (GAJENDRAGADKAR J.)

State of Punjab v. *Sukhdev Singh*, 1961 SC 493.

S. 162 Cl. 2.

The second clause of S. 162 in terms refers to objections as to the admissibility of the document. But this clause should be construed to refer to objections both as to production and to the admissibility of the document. (GAJENDRAGADKAR J.)

State of Punjab v. *Sukhdev Singh*, (*ibid.*).

Applicability to proceedings under 0. XI R. 19 (2), C.P.Code.

It cannot be contended that the provisions of S. 162 can be invoked only where a witness has been summoned to produce a document and a privilege is claimed in respect of it and not when the Court is called upon to decide the validity of the claim of privilege at the stage of inspection of documents and that where the State is a party to a suit and an application for inspection of documents is made against it by its opponent and a claim of privilege is put forward by the State, the Court is entitled under O. 11 R. 19(2) of the Civil Procedure Code to inspect the documents for the purposes of deciding as to the validity of the claim to privilege. It would be very strange that a claim for privilege to which O. 11 R. 19(2) refers is allowed to be raised under S. 123 of the Evidence Act whereas the procedure prescribed by the Act in dealing with such a claim by S. 162 is inapplicable. If S. 123 applies, *prima facie*, there is no reason why S. 162 should not likewise apply. The provisions of O. 11 R. 19(2) C.P.C. must therefore, be read subject to S. 162. (GAJENDRAGADKAR J.)

State of Punjab v. *Sukhdev Singh*, (*ibid.*).

Evidence of contents—whether permissible.

The jurisdiction conferred on the Court to deal with the validity of an objection, conferred by the first clause of S. 162 is not illusory or nominal, it has to be exercised in cases of objections raised under S. 123 also by calling for evidence

permissible in that behalf. It is perfectly true that in holding an enquiry into the validity of the objection, the Court cannot permit any evidence about the contents of the document, but that is not to say that other collateral evidence cannot be produced which may assist the Court in determining the validity of the objection. (GAJENDRAGADKAR J.)

State of Punjab v. *Sukhdev Singh*, (*ibid.*).

FIRMANS OF THE NIZAM OF HYDERABAD—**Effect.**

It cannot be disputed that prior to the integration of Hyderabad State with the Indian Union and the coming into force of the Indian Constitution, the Nizam of Hyderabad enjoyed uncontrolled sovereign powers. He was the supreme head of the executive, and there were no constitutional limitations upon his authority to act in any of these capacities. The 'Firmans' were expressions of the sovereign will of the Nizam and they were binding in the same way as any other law—nay they would override all other laws in conflict with them. So long as a Firman holds the field that alone will govern the rights of parties though it can be annulled or modified by a later Firman at any time that the Nizam willed. (MUKHERJEA C. J.)

Ameer-un-Nissa Begum v. *Mahaboob Begum*, 1955 SC 352.

FUNDAMENTAL RULES : **R. 44—whether mandamus can issue.**

Rule 44 confers no right on Government servants to the grant of dearness allowance ; it imposes no duty on the Government to grant it. It merely confers a power on the State to grant compassionate allowance at its own discretion and no mandamus can issue to compel the exercise of such a power.

(VENKATARAMA IYER J.)

State of Madhya Pradesh v. *G. C. Mandawar*, 1954 SC 493 : 1955 SCR 599 : 1954 SCJ 503 : 1954 SCA 767 : 1954 (2) MLJ 51.

FOREIGNERS ACT, 1946, **S. 3(1)(c)—person ceasing to be Indian citizen.**

In the case of a person who was born and domiciled in India prior to 26.1.1950 and who therefore became a citizen of India under Art 5(1)(a) of the Constitution who had not migrated to Pakistan but made only a short visit to that country it is true that a passsport obtained by him from Pakistan will show that he had renounced Indian citizenship and acquired Pakistani nationality. However, in view of S. 9(2) of the Citizenship Act such evidence in the absence of a decision by the Central Government, under S. 9 of that Act will be of no use in a prosecution for breach of an order under S. 3(1)(c) and in such circumstances a conviction would be wholly illegal. (SARKAR J.)

State of Andhra Pradesh v. *Abdul Khader*, 1961 SC 1467 : 63 Pun LR 751.

GENERAL CLAUSES ACT, 1897—**S. 3(42)—person.**

Whether the word "person" in a statute can be treated as including a corporation must depend upon a consideration of the object of the statute and of the enactments passed with a view to carry that object into effect.

(1880) 5 A.C. 857 Referred to.

Held, the term 'proprietor' defined in S. 2(o) of the Bihar Land Reforms Act, 1950, includes a company.

1953 Pat 105 Affirmed. (S. R. DAS J.)

Motipur Zamindari Co., Ltd. v. *State of Bihar*, 1953 SC 320 : 1953 SCR 720 : 1953 SCJ 451 : 1954 SCA 248 : 8 DLR SC 356 : 32 Pat 529 : 1 BLJ 399.

S. 3(56)—signature.

It is true that when signature by an agent is permissible the writing of the name of the principal by the agent is regarded under the common law rule as the signature of the principal himself. If a statute (The Bengal Agricultural Income Tax Act and the rules framed thereunder) requires personal signature of a person, which includes a mark, the signature or the mark must be that of the man himself. There must be physical contact between that person and the signature or the mark put on the document.

53 CWN 744 Reversed. (S. R. DAS J.)

Commissioner of Agricultural Income Tax, West Bengal v. *Kesab Chandra*, 1950 SC 265 : 5 DLR (SC) 98 : 1950 SCR 435 : 1950 SCJ 364 : 1950 ITR 569.

S. 6—Scope.

S. 6 is on the same lines as S. 38(2) of the Interpretation Act of England (1889). The broad proposition that section 6 is ruled out when there is a repeal of an enactment followed by a fresh legislation cannot be accepted.

58 All. 495 Disapproved.

Whenever there is a repeal of an enactment, the consequences laid down in S. 6 will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by a fresh legislation on the same subject, the provisions of the new Act would have to be looked into only for the purpose of determining whether they indicate a different intention. The question would be whether the new Act manifests an intention to destroy the old rights and liabilities. Such incompatibility or contrary intention would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material. (MUKHERJEA J.)

State of Punjab v. *Mohar Singh*, 1955 SCR 893 : 1955 SC 84 : 1955 SCA 609 : 1955 SCJ 25 : 1955 Cri LJ 254 : 1955 Nag LJ 384 : 1955 MWN 672.

Operation when excluded.

Where the repealing section which purports to indicate the effect of the repeal on previous matters, provides for the operation of the previous law in part and in negative terms, as also for the operation of the new law in other part and in positive terms, the said provision may well be taken to be self contained and indicative of the intention to exclude the application of S. 6. (JAGANNADHADAS J.)

Indira Sohanlal v. *Custodian of Evacuee Property, Delhi*, 1955 (2) SCR 1117 : 1956 SC 77 : 1956 SCA 618 : 1956 SCJ 171.

S. 8—applicability to Letters Patents.

The canon of construction contained in S. 8 is one of general application in the construction of Acts and there is no reasonable ground for holding that it should not be applied in construing the Charters of the different High Courts. Assuming without conceding that, strictly speaking, the provisions of the General Clauses Act do not for any reason apply, there is no justification for holding that the principles enunciated in those provisions have no application for construing these charters.

National Sewing Thread Co., Ltd. v. *James Chadwick and Bros.*, 1953 SC 357 : 1953 SCR 1028 : 1953 SCJ 509 : 1953 SCA 610 : 8 DLR SC 472 : 56 Bom LR 21 : 1953 (2) MLJ 215.

GHATWALI TENURE—**nature of.**

A Government *Ghatwali* tenure is a tenure created by the ruling power in favour of a person who is required to render *Ghatwali* services to it whereas a *Zamindary Ghatwali* is a tenure created by a *Zamindar* for *Ghatwali* services to be rendered to him. While a Government *Ghatwali* has been uniformly held to be inalienable, a *Zamindary Ghatwali* may be alienated with the consent of the *Zamindar* and where the local custom permits, even without his consent and consent is generally presumed when it is found that alienation has been made without any objection from the *Zamindar*.

In order to determine the true character of a *Ghatwali* tenure it is usually necessary to look into the grant by which the tenure was created. Where no clear evidence is forthcoming as to the true character of the *Ghatwali*, the fact that the tenure is included within a *Zamindary* and is covered by the *Jumma* assessed on it should turn the scale in favour of the party alleging that it is a tenure which is dependent on the Zamindary. (FAZL ALI J.)

Sukhdev Singh v. *Maharaja Bahadur of Girdhaur*, 1951 SCR 534 : 1951 SC 288 : 1951 SCJ 386 : 30 Patna 931 : 1951 ALJ 141.

Whether alienable.

It is well settled that *Ghatwali* tenures held under the *Zamindar* are by custom, judicially recognised, alienable with the assent of the Zamindar while *Ghatwali* tenures held under the Government direct are not alienable. Therefore a *Ghatwali* tenure held under a *Zamindar* may be sold, at the instance of the Zamindar, in execution of a decree for arrears of rent.

Case-law Referred to. (S. R. DAS J.)

Rudreshwari Prasad Sinha v. *Rani Probhabati*, 1952 SCR 153 : 1951 SCJ 785 : 30 Patna 1223 : 1952 SC 1.

GOVERNMENT OF INDIA ACT, 1915—**S. 108(1)—vested in the Court.**

The words "vested in the Court" cannot be read as meaning "now vested in the Court." It is a well known rule of construction that when a power is conferred by a statute it may be exercised from time to time when occasion arises unless a contrary intention appears. The power to make rules conferred by section 108 still subsists, notwithstanding the repeal of the Government of India Act, 1915 and the enactment of its provisions in the Government of India Act, 1935 and the Constitution of India, for they do not affect the power granted by S. 108, Government of India Act, 1915 but on the otherhand keep it alive and reaffirm it with great vigour. It is thus difficult to accept the argument that the power vested in the High Court under S. 108 was a limited one and could only be exercised in respect to such jurisdiction as it possessed on the date when the Act of 1915 came into force.

(1946) 2 Cal. 359 Overruled. (MAHAJAN J.)

National Sewing Thread Co., Ltd. v. *James Chadwick & Bros.*, 1953 SC 357 : 1953 SCR 1028 : 1953 SCJ 509 : 1953 SCA 610 : 8 DLR SC 472 : 56 Bom LR 21 : 1953 (2) MLJ 215.

GOVT. OF INDIA ACT, 1935—S. 240—**Remedies of Government servants.**

To the extent that the rule that Government servants hold office during pleasure has been departed from by the statute they are entitled to relief like any other person under the ordinary law. (MAHAJAN J.)

State of Bihar v. *Abdul Majid*, 1954 SC 245 : 1954 SCR 786 : 1954 SCJ 300 : 1954 SCA 226 : 9 DLR SC 266 : 1954 ALJ 280 : 67 LW 550 : 1954 MBLJ SC 38 : 2 BLJ 183 : (1954) Pat 266.

Discharge as per service agreement.

Where a Govt. servant was discharged from service as per the terms of his service agreement after payment to him of gratuity and one month's pay in lieu of notice, he cannot be heard to complain that no charge sheet had been laid against him and proceedings taken thereunder. (S. R. DAS J.)

Gopal Krishna v. *Union of India*, 1954 SC 632.

Voluntary retirement.

Where a civil servant who has attained the age of 55, for some reason or other himself confesses his inability to continue in service any longer and seeks permission for retirement it will be a useless formality to ask him to show cause why his service should not be terminated. In such circumstances the section can have no application. (MUKHERJEA J.)

Jai Ram v. *Union of India*, 1954 SC 584 : 1954 SCA 1251 : 1954 SCJ 809.

Police forces.

In view of the special provisions in S. 243 relating to Government servants belonging to the subordinate ranks of police forces in India, S. 240(3) will have no application to them.

1915 Punj. 118 Affirmed. (WANCHOO J.)

Bhagat Singh v. *State of Punjab*, 1960 SC 1210.

S. 296(2)—Scope of.

It cannot be contended that the section imposes an obligation on the Provincial Legislature to constitute a tribunal to exercise appellate or revisional powers in Revenue cases but only fixes a *terminus a quo* upto which the tribunal constituted by the Governor is to exercise jurisdiction.

1956 Assam 142 Reversed. (S. R. DAS C. J.)

State of Assam v. *Sristikar Dowerah*, 1957 SCR 295 : 1957 SC 414 : 1957 SCA 697 : 1957 SCJ 345.

GRANT—**Rule of strict construction against grantor.**

When the parties have first expressed themselves in one way and then go on saying something, a clear dispostion by an earlier clause will not be allowed to be cut down by a later clause. When there is ambiguity all parts of the document have to be looked into to ascertain what was really intended by the parties and the document being the grantor's document it must be interpreted strictly against him and in favour of the grantee. But where on a proper construction of a docu-

ment as a whole the intention of the parties is clearly established there is no scope for applying the rule of strict construction against grantor. (DAS GUPTA J.)

Mohd. Kamgharshah v. *Jagadish Chandra Das*, 1960 (3) SCR 604 : 1960 SC 953.

Inalienability—burden of proof.

In a suit for a declaration that a sale deed of certain lands is void on the ground that the lands which had been granted to temple officials were endowed lands and had been burdened with service to the temple, i.e., the grantees were entitled to enjoy the lands on condition that they rendered the requisite service to the temple and that as a corollary of the burden imposed on the grantees by the said grant the lands were inalienable to strangers though they could be transferred to any one of the temple officials, the onus is on the plaintiff to prove that the land is so inalienable.

1955 Assam 23 Affirmed. (GAJENDRAGADKAR J.)

Jibon Chandra Sharma v. *Anandi Ram Kalita*, 1961 SC 1309.

Lost grant.

There is no doubt that a presumption of an origin in some lawful title may in certain circumstances be made to support possessory rights long and quietly enjoyed where no actual proof of title is forthcoming but it is equally well established that presumption cannot be made where there is sufficient evidence and convincing proof of the nature of the grant and the persons to whom it was made. (S. R. DAS J.)

Satyanarayana v. *Konduru Venkatappayya*, 1953 SC 195 : 1953 SCR 1001 : 1953 SCJ 283 : 8 DLR SC 274 : 1953 (1) MLJ 693 : 66 LW 536.

HINDU LAW

SUMMARY.

1. ADOPTION.
2. ALIENATION.
3. ASCETIC.
4. DEBTS.
5. FAMILY ARRANGEMENT.
6. IMPARTIBLE ESTATE.
7. JOINT FAMILY
8. MAINTENANCE.
9. MARRIAGE.
10. PARTITION.
11. RELIGIOUS ENDOWMENT.
12. SUCCESSION.
13. WIDOW.
14. WIDOW'S ESTATE.

1. ADOPTION.

Dating back—succession to collaterals.

The principle of relation back applies only when the claim made by the

adopted son relates to the estate of his adoptive father. This estate may be definite and ascertained as when he is the sole and absolute owner of the properties or it may be fluctuating as when he is a member of a joint Hindu family in which the interest of the coparceners is liable to increase by death or decrease by birth. In either case it is the interest of the adoptive father which the adopted son is declared entitled to take as on the date of his death.

In deciding that an adopted son is entitled to divest the estate of a collateral which had devolved by inheritance prior to his adoption , the decision of the Privy Council in *Anant* v. *Shankar*, 1943 PC 196 went far beyond what had been previously understood to be the law.

The relation back of the right of an adopted son is only *quoad* the estate of the adoptive father. The Privy Council decision in so far as it relates to properties inherited from collaterals is not sound. In respect of such properties the adopted son can lay no claim on the ground of relation back.

Case-law discussed.
1943 PC 196 held not sound ; 1950 Bom. 510 (FB) Approved.
(VENKATARAMA IYER J.)

Srinivas v. *Narayan* , 1954 SC 379 : 1955 (1) SCR 1 : 1954 SCJ 408 : 1954 SCA 878 : 9 DLR SC 320 : 57 Bom LR 678 : 67 LW 515 : 1954 (1) MLJ 630 : 1954 VLJ 78.

Illustrative case.

The case of an adopted son's claiming to divest the heir of a collateral, who died before the adoption took place, of the property inherited from the collateral, is different from the case of his claiming the property which originally belonged to the adoptive father but had devolved on a collateral and after the death of the collateral, which took place before the adoption, devolved on a heir of the collateral. In the former case the claim is to the property of the collateral while in the latter case it is to the property of the adoptive father which by force of circumstances had passed through the hands of a collateral.

One N, a sole surviving coparcener, died in 1892 leaving behind him one T, the widow of a predeceased son and a daughter K, who thereupon inherited the property as a full owner according to the Hindu law in that area. K died in 1933 and her son V succeeded her. V died in 1934 and his two sons succeeded V. Thereafter T adopted one D who sued the sons of V for recovery of the properties. *Held* (decreeing the plaintiff's suit),

The heir of a collateral succeeding to the sole surviving coparcener inherits the property absolutely but subject to defeasance and the right in the property devolves on his heir, who must consequently take that property absolutely, but still subject to defeasance, as no better title can be inherited so long as there is the possibility of the defeasance of the absolute title by a widow of the family of the last surviving coparcener adding a member to the coparcenary by adopting a son to her deceased husband and therefore the fact that K inherited the property of her father absolutely did not affect this question of title being defeated on the adoption of a son by T.

(1955) Bom. 837 Overruled ; 1955 (1) SCR 1 Ref. to. (RAGHUBAR DAVAL J.)

Krishnamurthi V. Deshpande v. *Dhruvaraj*, 1961 (2) MLJ 152 : 1961 (2) SCJ 582 : 1961 Nag LJ 530.

Giving and taking—delegation.

Under the Hindu Law, whether among the regenerate classes or among *sudras*, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking.

The object of the corporeal giving and taking is obviously to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for the ceremony but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. The exigencies of the situation arising out of diverse circumstances necessitated the introduction of the doctrine of delegation. Therefore, under certain unavoidable compelling circumstances, the natural and adoptive parents, after exercising their volition to give and take the boy in adoption, may, both or either of them, delegate the physical act of handing over of the boy or receiving him, to a third party.

(SUBBA RAO J.)

Lakshmana Singh Kothari v. *Smt. Rup Kanwar*, 1961 SC 1378.

Performance of obsequies—presumption.

The mere fact of performance of funeral rites does not necessarily support an adoption. The performance of these rights frequently varies according to the circumstances of each case and the view and usage of different families.

(KAPUR J.)

Kishorilal v. *Chaltibai*, 1959 Sup. 1 SCR 698 : 1959 SCJ 560 : 1959 SC 504.

Power of widow.

For about three quarters of a century the rule that "the power of a widow to adopt comes to an end by the interposition of a grandson or the son's widow competent to adopt" has become a part of Hindu Law. It does not revive on the death of the grandson or the son's widow.

10 MIA 279 Rel. on ; 26 Bom. 526 (FB) Approved ; (1941) Nag. 178 and 1946 Oudh 163 Overruled—Case law Reviewed. (MAHAJAN C. J.):

Gurunath v. *Kamalabai*, 1955 SCR 1135 : 1955 SC 206 : 1955 SCA 241 1955 SCJ 178 : 57 Bom LR 694 : 1955 (1) MLJ 91 : 1955 Nag LJ 269 : 1955 Andh WR 91 : 1955 BLJR 368 : 1955 ALJ 461 : 1955 Andh LT 136.

Punjab—Custom.

Under the Hindu Law adoption is primarily a religious act intended to confer spiritual benefit on the adoptor and some of the rules therefore have been held to be mandatory and compliance with them regarded as a condition to the validity of the adoption. On the other hand, under the customary law in the Punjab, adoption is secular in character, the object being to appoint an heir and the rules relating to ceremonies and to preferences in selection have to be held to be directory only.

The custom founded on question 9 and its answer recorded in the *Riwaj-i-am* as to recognition of adoption of near collaterals only is not mandatory and an adoption made in disregard of it is not invalid.

Case Law discussed. (GHULAM HASAN J.)

Hem Singh v. *Harnam Singh*, 1954 SC 581 : 1955 (1) SCR 44 : 1954 SCJ 566 : 1954 SCA 199 : 9 DLR SC 314.

2. ALIENATION

Notice of alienee—Mortgagee.

When joint ancestral property has passed out of a joint family, either under a conveyance executed by the father in consideration of an antecedent debt, or

in order to raise money to discharge an antecedent debt or under a sale in execution of decree for the father's debt, the sons cannot recover the property unless they prove that not only the antecedent debts were contracted for immoral purposes but also that the purchaser had notice that they were so contracted.

This proposition enumerated in 1879 by the Privy Council in 6 Ind. App. 88 has been accepted as the correct statement of Hindu Law on the point by all the courts in India, and therefore it would be inexpedient to reopen the question after such a long lapse of time and decide the joint family in the light of ancient Sanskrit texts which will not be an easy task today. The principle of *stare decisis* inevitably comes into operation in a case of this character.

Case-Law discussed.

In this context no valid distinction can be made between a mortagage and a sale especially after the decision in 51 Ind. App. 129 (*Brij Narain's case*).

28 All 508 Overruled ; 1954 Saur. 36 Affirmed. (GAJENDRAGADKAR J.)

Luhar Amritlal v. *Doshi Jayantilal*, 1960 SC 964.

Recitals in deed as to necessity.

Where the question is whether an alienation is supported by legal necessity, if all the original parties to the transaction and those who could have given evidence on the relevant points are dead, a recital consisting of the principal circumstances of the case assumes greater importance and cannot be lightly set aside.
(FAZL ALI J.)

Iswar Gopal v. *Pratapmal Bagaria*, 1951 SC 214 : 64 LW 525 : 1951 SCR 332 : 6 DLR (SC) 199 : 1951 SCJ 285 : 1951 ALJ 74 : BLR 1951 SC 183 : 2 Raj LW 305 : (1951) 2 Cal 91.

Alienation by trustee—Presumption.

Where the validity of a permanent lease granted by a trustee is called into question after a long time after the grant, although it is not possible to ascertain fully the circumstances in which it was made, the Court should assume that the grant was made for legal necessity so as to be valid beyond the lifetime of the grantor. (FAZL ALI J.)

Iswar Gopal v. *Pratapmal Bagaria*, (*ibid.*).

3. ASCETIC

Entry into religious order generally operates as civil death. The man who becomes an ascetic severs his connection with the members of his natural family and being adopted by his preceptor, becomes, so to say, a spiritual son of the latter. (MUKHERJEA J.)

Sital Das v. *Sant Ram*, 1954 SC 606.

4. DEBTS

Avyavaharika **debt—meaning.**

The translation given by Colebrooke of the term "*Avyavaharika* debt" i.e., "any debt for a cause repugnant to good morals" is the nearest approach to its true concept.

70 Ind App 171 Relied on. (KAPUR J.)

S. M. Jakati v. *S. M. Borkar*, 61 Bom LR 688 : 1959 SCJ 719 : 59 CLJ 81 : 1959 (2) MLJ 21 : 1959 SCR 1384 : 1959 SC 282.

The liability of a father (who is a managing director drawing a salary or a remuneration) incurred as a result of negligence in the discharge of his duties is not an *avyavaharika* debt. (KAPUR J.)

S. M. Jakati v. *S. M. Borkar*, (*ibid.*).

Pious obligation—principles.

In regard to the theory of pious obligation of a son (grandson, great grandson) to pay the debts of his father the following propositions are well settled :—

(1) There is no personal liability irrespective of the receipt of any assets. The obligation is therefore limited to the assets received by him in his share of the joint family property or to his interest in such property and does not attach to his self acquisitions.

53 Ind. App. 204 Ref. to.

(2) The duty being religious or moral, the obligation ceases to exist if the debt is tainted with immorality or vice.

(3) The pious obligation exists whether the father is alive or dead.

51 Ind. App. 129 Ref. to.

(4) It is open to the father to transfer the joint family property including his son's interest therein to pay his antecedent debt not incurred for family necessity or benefit provided that it is not tainted with immorality. It is equally open to a creditor to obtain a decree against the father and in execution of the same bring to sale not merely the father's but also the son's interest in the joint estate. The sons cannot resist the sale unless they succeed in establishing that the debts were contracted for immoral purposes.

1 Ind App 321, 1 Ind App 333, 6 Ind App 88 and 51 Ind App 129 Ref. to.

(5) The sons are not liable for the post-partition debts of the father. The father's share which after his death comes to the sons may certainly, at the hands of the latter, be available to the creditors ; *vide* Mayne's Hindu Law 11th Edn. p. 430. (MUKHERJEA J.)

Pannalal v. *Mt. Naraini*, 1952 SC 170 : 1952 SCR 544 : 1952 SCJ 211 : 1952 (2) MLJ 83 : BLR 1952 SC 204 : 1952 MWN 442 : 7 DLR SC 313 : 1953 SCA 871 : 90 CLJ 241 : 66 LW 511.

Nature of the obligation.

It is not necessary, in order to saddle the sons with the pious obligation to pay the debts of their father, that the father should be the Manager or Karta of the joint family or that the family must consist of the father and his sons and no other male member. It is not in any way dependent upon the constitution the family either at the time when the debt was contracted or when the obligation is sought to be enforced. This special liability created on purely religious grounds which has its basis entirely on the relationship between the father and the son can be enforced only against the sons of the father and no other coparcener.

57 Mad 190 Approved ; 1949 Pat 309 Reversed.

It cannot be laid down as a proposition of law that the creditors' power of

proceeding against the sons' share in the joint estate for recovery of the debt due by the father is co-extensive with the father's power of disposal over such interest.

1952 SCR 544 Referred to. (MUKHERJEA J.)

Siddeshwar Mukherjee v. *Bhubaneshwar Prasad Narain Singh*, 1953 SC 487 : 1954 SCR 177 : 1953 SCJ 700 : 67 LW 1 : 1954 SCA 216 : 9 DLR SC 39 : 1954 ALJ 54 : 1953 (2) MLJ 789 : (1954) Pat 1 : 2 BLJ 65.

Creditor's suit—sons, whether necessary parties.

Strictly speaking the sons cannot be said to be necessary parties to a money suit instituted by a creditor against the father on the basis of a promissory note. No doubt the sons can be made parties in order that the question of their liability for the debt of their father might be decided in their presence. A money decree passed against a father certainly creates a debt payable by him and if it is not tainted with immorality it is open to the creditor to realise the dues by attachment and sale of the sons' coparcenary interest in the joint property. The creditor can, if he likes, proceed against the father's interest alone but he can, if he so chooses, put up to sale the sons' interest also and it is a question of fact in each individual case whether the smaller or the larger interest was actually sold in execution.

Where as a matter of fact the executing Court intended to sell and did sell the undivided interest of the son also, all that the son can claim is that, not being a party to the sale or the execution proceeding, he ought not to be barred from trying the nature of the debt or his liability to pay the same in any suit or proceeding started by him or to which he might be made party. He could raise the point by way of objection in the execution proceeding itself or he could himself file a suit for a declaration that the debt was not binding on him. He could also raise it by way of defence when the auction purchaser seeks to have his rights defined and demarcated in a partition suit. (MUKHERJEA J.)

Siddeshwar Mukherjee v. *Bhubaneshwar Prasad Narain Singh*, (*ibid.*).

Effect of partition.

Even though the father's power to discharge his debt by selling the share of his sons in the joint family property may no longer exist as a result of partition, the right of the judgment creditor to seize the erstwhile coparcenary property remains unaffected and undiminished because of the pious obligation of the sons unless the debt was one for an illegal or immoral purpose. (KAPUR J.)

S. M. Jakati v. *S. M. Borkar*, 1959 SCR 1384 : 1959 SC 282 : 61 Bom LR 688 : 1959 SCJ 719 : 59 CLJ 81 : 1959 (2) MLJ 21.

Arrangement for payment of debts.

The sons are liable to pay the pre-partition debts of the father even after partition unless there has been an arrangement for payment of these debts at the time of the partition. Their separated shares are liable even after partition for the pre-partition debts of the father which are not illegal or immoral.

22 Mad 519 and 41 Mad 136 Overruled ; 51 Mad 361 (FB), 52 Bom 376, 14 Lah 399, 14 Pat 732 (FB), 53 All 868 (FB) and 6 Luck 497 (FB) Referred to.

An arrangement for payment of debts does not necessarily imply the setting up of a separate fund before division of the net assets or the giving of additional property to the father over his share to pay the debts. Whether there is a proper arrangement for payment of debts or not has to be decided on the facts and circumstances of each case. If the arrangement made at the time of the partition

is reasonable and proper, an unsecured creditor cannot complain. Of course if the transaction is nominal or fraudulent, it can be ignored or set aside.

(MUKHERJEA J.)

Pannalal v. *Mt. Naraini*, 1952 SC 170 : 1952 SCR 544 : 1952 SCJ 211 : 1952 (2) MLJ 83 : BLR 1952 SC 204 : 1952 MWN 442 : 7 DLR SC 313 : 1953 SCA 871 : 90 CLJ 241 : 66 LW 511.

Enforcement after partition—Ss. 47, 50, 52 and 53, C.P.C.

After partition the father no longer represents the family and a decree obtained against him cannot bind the separated sons. The father's power to sell the son's share for discharging his personal debts comes to an end with the partition. S.60 C.P.C. bars the attachment and sale of the son's share in execution of a decree against the father. A separate and independent suit must be brought against the sons before their shares can be reached.

1938 Nag 24 Approved ; 38 Mad 1120, 51 Mad 361, 1937 Mad 458, (1939) Bom 658, 14 Pat 732 and (1938) Nag 10 Referred to.

The position will, however, be different materially if the sons are made parties to the suit as legal representatives of their deceased father and a decree is passed against them limited to the assets of the deceased father in their hands. A proceeding for execution of such a decree would attract the operation of S. 47 C.P.C.

S. 53 C.P.C. is comprehensive enough to include all cases where a son is in possession of ancestral property which is liable under Hindu Law to satisfy his father's debts and either the decree is against the son as the legal representative of his father or the original decree being against the father, it is executed against the son as the legal representative under S. 50 C.P.C.

The son would certainly be at liberty to show that the property in his hands is for certain reasons not liable to pay the debts of the father and all these questions will have to be decided by the executing court under S. 47.

Dissenting view in 14 Pat 732 (FB) Approved. (MUKHERJEA J.)

Pannalal v. *Mt. Naraini* (*ibid.*).

Execution proceedings—sale after partition.

Where the pious obligation exists and partition takes place after the decree and pending execution proceedings, the sale of the whole estate in execution cannot be challenged except on proof by the sons of the immoral or illegal purpose of the debt and partition cannot relieve the sons of their pious obligation or impair the rights of the creditor. Therefore where after attachment and a proper notice of sale the whole estate, including the sons' share, which was attached, is sold in execution of a decree obtained against the father alone in respect of a debt which is not *avyavaharika* and the purchaser buys it intending it to be the whole coparcenary estate, the presence of the sons *eo nominee* is not necessary, even though a partition might have taken place after decree and before the sale, because they still have the right to challenge the sale on showing the immoral or illegal purpose of the debt. (KAPUR J.)

S. M. Jakati v. *S. M. Borkar*, 1959 SCR 1384 : 1959 SC 282 : 61 Bom LR 688 : 1959 SCJ 719 : 59 CLJ 81 : 1959 (2) MLJ 21.

5. FAMILY ARRANGEMENT

Conduct of members—inference.

A family arrangement can as a matter of law, be implied from a long course of dealings. The conduct of various members of the family is relevant to show

that their actings, viewed as a whole, suggest the existence of a family arrangement.

All that can reasonably be expected in proof of a family settlement said to have been made a long time back, (in the instant case in 1875) is inferences from conduct of members of the family.

Hence statements that deceased members of the family made as witnesses will be as relevant as recitals made by them in deeds as evidence of conduct, though they will not be admissible, unless they were made against the proprietary interests of the makers, to prove the fact in issue, namely the family arrangement.

(BOSE J.)

Sahu Madho Das v. *Mukand Ram*, 1955 (2) SCR 22 : 1955 SC 481 : 1955 SCA 1057 : 1955 SCJ 417 : 1955 (2) MLJ 1 : 1955 MWN 919 : (1955) 2 All 177.

Whether deed in writing is necessary.

It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary.

So strongly do the courts lean in favour of family arrangements that bring about harmony in a family and do justice to its various members and avoid, in anticipation, future disputes which might ruin them all, that the courts have no hesitation in taking the next step (fraud apart) and upholding an arrangement under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their number (provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to their shares as gifts pure and simple from him or her, or as a conveyance for consideration when consideration is present. But, in that event, the formalities of law about the passing of title by transfer will have to be observed, and now either registration or twelve years adverse possession will be necessary.

An oral arrangement would be sufficient to pass title in a case, where the arrangement was made in 1875 at a time when the Transfer of Property Act was not in force.

(BOSE J.)

Sahu Madho Das v. *Mukand Ram*, (*ibid*).

Validity.

The validity of a family arrangement of disputed rights depends on the facts existing at the time, and will not be affected by subsequent judicial determinations, showing the rights of parties to be different from what was supposed, or that one party had nothing to give up.

23 LJ Ch 505 Relied on.

Where a family arrangement is entered into settling the disputed claims of members supposed by the parties to be governed by a particular ruling of a High Court, on that ruling being subsequently overruled, a party to the arrangement

cannot impeach it saying that as per the altered law there was no bonafide dispute. (SINHA J.)

Ponnammal v. *Srinivasaraghavan*, 1956 SC 162.

6. IMPARTIBLE ESTATE

Alienation by holder.

The person in whom the inheritance to an impartible estate has vested is competent to alienate a portion of it. (MAHAJAN J.)

Chinnathayi v. *Kulasekhara Pandiya*, 1952 SC 29 : 1952 SCR 241 : 1952 SCJ 1 : 1952 (1) MLJ 292 : BLR 1952 SC 61 : 1952 MWN 126 : 7 DLR (SC) 289 : 65 LW 1166.

Power to divide.

In the case of an impartible estate the power to divide it amongst the members does not exist though the power in the holder to alienate it is there. From the existence of the one the other power cannot be inferred as it is destructive of the very character of the estate. (MAHAJAN J.)

Chinnathayi v. *Kulasekhara Pandiya*, (*ibid.*)

Nature of estate.

To establish that an impartible estate has ceased to be joint family property for purposes of succession it is necessary to prove an intention, express or implied on the part of the junior members of the family to give up their chance of succeeding to the estate. (MAHAJAN J.)

Chinnathayi v. *Kulasekhara Pandiya*, (*ibid.*)

Release of right of succession.

A member of a joint family owning an impartible estate can on behalf of himself and his heirs renounce his right of succession. But any such relinquishment must operate for the benefit of all the (other) members and must be in favour of all the branches of the family or the head of the joint family as representing all. (MAHAJAN J.)

Chinnathayi v. *Kulasekhara Pandiya*, (*ibid.*)

It is well settled that general words of a release do not mean release of rights other than those then put up and have to be limited to the circumstances and those things which were in the contemplation of the parties then when the release was executed. (MAHAJAN J.)

Chinnathayi v. *Kulasekhara Pandiya*, (*ibid.*)

7. JOINT FAMILY

Presumption.

The general principle undoubtedly is that a Hindu family is presumed to be joint until the contrary is proved. But where one coparcener separates himself from the others and has his share in the joint property partitioned off for him, there is no presumption that the others continued to be joint. Nor is there a presumption that there has been a separation in regard to all the members. It

is a question of fact in each case to be determined upon the evidence relating to the intention of the parties. The burden lies on the party asserting the existence of a particular state of things on the basis of which he claims relief.

30 Cal 725 (P.C.), 1925 P.C. 49 and 1931 P.C. 154 Rel. on. (MUKHERJEA J.)

Bhagawati Prasad v. *Rameshwari Kuer*, 1952. SC 72 : 1952 SCJ 115 : BLR 1952 SC 106 : 7 DLR (SC) 229 : 1951 SCR 603.

Joint family business.

Under the Hindu Law there is no presumption that a business standing in the name of any member is a joint family one even when that member is the manager of the family and it makes no difference in this respect that the manager is the father of the coparceners. It is no doubt that with reference to a newly started trade there is this difference between the position of a father and a manager that while the debt contracted by the former would be binding on the sons on the theory of pious obligation those incurred by a manager would not be binding on the members unless at least there was necessity for starting the trade. But it is one thing to say that the sons are liable for the debts contracted by the father in the trade newly started by him and quite another thing to treat the trade itself as a joint family concern. (VENKATARAMA IYER J.)

Chattanatha Karayalar v. *Ramachandra Iyer*, 1955 (2) SCR 477 : 1955 SC 799 : 1956 SCA 361 : 1956 SCJ 1 : 1956 (1) MLJ 1 : 58 Pun LR 314.

Joint family property—presumption.

Where the joint family possessed sufficient nucleus and the *karta* had no other source of income the presumption arises that an acquisition in his name also forms part of joint family property. (SARKAR J.)

Mallappa Girimallappa v. *Yellappa Gowda*, 1959 SC 906.

Sufficiency of nucleus.

The important thing to consider is the income which the nucleus yields. A building in the occupation of the members of the family and yielding no income could not be a nucleus out of which acquisitions can be made, even though it might be of considerable value. On the other hand a running business in which capital invested is compartively small might conceivably produce substantial income which may well form the foundation of the of the subsequent acquisitions. These are not abstract questions of law but questions of fact to be determined on the evidence in the case. (VENKATARAMA IYER J.)

Srinivas v. *Narayan*, 1954 SC 379 : 1955 (1) SCR 1 : 1954 SCJ 408 : 1954 SCA 878 : 9 DLR SC 320 : 57 Bom LR 678 : 67 LW 515 : 1954 (1) MLJ 630 : 1954 VLJ 78.

Question of fact.

The sufficiency of the nucleus to purchase any particular item of property is a question of fact and cannot be canvassed in second appeal. (SARKAR J.)

Mallappa Girimallappa Betgeri v. *Yellappa Gowda*, 1959 SC 906.

Gift by father of self-acquisition.

It is not possible to hold that self-acquired property of a father gifted or bequeathed to a son must necessarily and under all circumstances, rank as ancestral

property in the hands of the donee in which his sons would acquire a co-ordinate interest, for, in such a case, the son receives it not because he is a son or has any legal right to such property but because his father chose to bestow a favour on him which he could have bestowed on any other person as well.

6 WR 71 (Cal.) Overruled ; case law discussed.

The father when he makes a gift is quite competent to provide expressly either that the donee would take it exclusively to himself or that the gift would be for the benefit of his branch of the family. Thus the interest which the son takes must depend upon the will of the grantor. If there are express provisions in the deed of gift or a will no difficulty is likely to arise ; if, however, there are no clear words describing the kind of interest which the son is to take, the question would be one of construction and the court would have to collect the intention from the language of the document taken along with the surrounding circumstances in accordance with the well known canons of construction. Stress must be laid on the substance of the disposition and not on its mere form. The material question to decide is whether the donor intended to confer a bounty upon the son exclusively for his benefit and capable of being dealt with by him at his pleasure or whether the apparent gift was an integral part of a scheme for partition. As it is open to the father to make a gift or partition of his self-acquired properties as he himself chooses, there is, strictly speaking, no presumption that he intended either the one or the other. (MUKHERJEA J.)

Arunachala v. *Muruganatha*, 1953 SC 495 : 1954 SCR 243 : 1953 SCJ 707 : 1954 SCA 24 : 9 DLR SC 18 : 66 LW 1072 : 1953 (2) MLJ 796 : 1953 MWN 878 : 2 BLJ 1 : 1954 ALJ 25.

Long possession—presumption.

Where a property is found to have been in the possession of a family from time immemorial, it is not unreasonable to suppose that it is ancestral and to throw the burden on the party pleading self-acquisition to establish it, as an acquisition by a member would ordinarily be evidenced by a deed, while it is not unusual for a family to hold properties for generations without a title deed.

(VENKATARAMA IYER J.)

Srinivas v. *Narayan*, 1954 SC 379 : 1955 (1) SCR 1 : 1954 SCJ 408 : 1954 SCA 878 : 9 DLR SC 320 : 57 Bom LR 678 : 67 LW 515 : 1954 (1) MLJ 630 : 1954 VLJ 78.

Acquisition by manager—burden of proof.

There is no doubt that where a manager claims that any immoveable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence that the purchase money proceeded from his separate fund. The onus of proof in such a case must be placed on the manager and not on his coparceners. (GAJENDRAGADKAR J.)

Mallesappa B. Desai v. *Desai Mallappa*, 1961 SC 1268.

Blending.

The rule of blending postulates that a coparcener who is interested in the coparcenary property and who owns separate property of his own may by deliberate and intentional conduct treat his separate property as forming part of the coparcenary property. There can be no doubt that conduct on which such a plea is based must clearly and unequivocally show the intention of the owner of the separate property to convert it into an item of joint family property. A mere

intention to benefit the members of the family by allowing them the use of the income of the said property may not necessarily be enough to justify an inference of blending. (GAJENDRAGADKAR J.)

Mallesappa B. Desai v. *Desai Mallappa*, (*ibid.*).

Blending—property of wife of coparcener.

The doctrine of blending inevitably postulates that the owner of the separate property is a coparcener who has an interest in the coparcenary property and desires to blend his separate property with the coparcenary property. It is difficult to understand how this doctrine can be applied to the case of a Hindu female who has acquired immoveable property from her father as a limited owner. She cannot circumvent the rules of Hindu Law and allow the members of her husband's family to treat her limited estate as part of the joint property belonging to the said family. Such a result will be inconsistent with the basic notion of blending and the basic character of a limited owner's title to the property held by her.

Hence the principle of blending cannot be invoked in respect of property owned by the wife of a coparcener who obtained it by succession to her father. (GAJENDRAGADKAR J.)

Mallesappa B. Desai v. *Desai Mallappa*, (*ibid.*).

Division in status—partition by arbitrators—crucial date.

An agreement between the members of a joint Hindu family to appoint arbitrators for dividing family properties amounts to severance of the joint family status from the date of the agreement. Once reference is made, joint family status is severed and it is not postponed until the division of the property by metes and bounds. (SHAH J.)

Kashinathsa Y. Kabadi v. *Narasingsa B. Kabadi*, 1961 SC 1077.

Insurance policy amount.

Proceeds of an insurance policy in the name of a coparcener for which the premia were paid out of joint family funds also form assets of the coparcenary and are not the separate property of the deceased.

32 Pat 983 Affirmed. (HIDAYATULLAH J.)

Parbati Kuer v. *Sarangadhar Sinha*, 1960 SC 403 : (1959) 29 Com Cas 68 : 1960 Pat LR 27.

Punjab—Ancestral property—Custom.

Under the customary law of the Punjab the property inherited by a Hindu from his maternal grandfather is not ancestral *qua* his descendants.

32 Pun Rec (1895) 124 (FB) and 5 Lah 356 (FB) Overruled.
1950 Pun 1(FB) Approved ; 1953 Pun 268 Affirmed. (GAJENDRAGADKAR J.)

Maktul v. *Manbhari*, 1958 SC 918 : 1958 SCJ 1268 : 1959 SCR 1099 : (1958) Punj 2305.

Punjab—Revenue records.

It cannot be said that merely because the possession by the common ancestor itself is not shown in the revenue records but that of a more remote direct ancestor

is, the property is not ancestral even though the history of the land gives no indication of its acquisition by the descendants except by inheritance. (KAPUR J.)

Gurbachan Singh v. *Puran Singh*, 1961 SC 1263.

Karta—Partnership with strangers.

It is well settled that when the Karta of a joint Hindu family enters into a partnership with strangers, the members of the family do not *ipso facto* become partners in that firm. They have no right to take part in its management or to sue for its dissolution.

The creditors of the firm would not doubt be entitled to proceed against the joint family assets including the shares of the non-partner coparceners for realisation of their debts, because the Karta has the right when properly carrying on business to pledge the credit of the joint family to the extent of its assets. The liability of the junior members arises by reason of their status as coparceners and not by reason of any contract of partnership by them. (VENKATARAMA IYER J.)

Bhagat Ram v. *Commissioner of E.P.T., Nagpur*, 1956 SCR 143 : 1956 SC 374 : 1956 SCA 394 : 1956 SCJ 312 : 1956 (1) MLJ 160 : 1956 SCC 215 : (1956) 29 ITR 521.

Deposit with Karta of Family—Liability of each branch subsequent to partition.

The Karta of a family has the authority to execute a document evidencing a deposit of money with the family. His act is binding on all the members of the joint family. After division, neither branch of the joint family can be heard to say that they are not bound by the transaction. (BHAGWATI J.)

Annamalai Chettiar v. *Veerappa Chettiar*, 1956 SC 12.

Renunciation by one member.

A member of a joint Hindu family may without receiving any share in the estate renounce his interest therein. Such renunciation merely extinguishes his interest and does not affect the status of the other members *vis-a-vis* the family property. (SUBBA RAO J.)

Rukhma Bai v. *Laxminarayan*, 1960 SC 335 : 1960 (2) SCR 253 : 1960 SCJ 433 : 1960 (1) SCA 624.

Right of auction purchaser.

The execution purchaser of an undivided interest in coparcenary property does not acquire title to any defined share in the property and is not entitled to joint possession from the date of his purchase ; he can work out his rights only by a suit for partition and his right to possession and to mesne profits would date from the period when a specific allotment is made in his favour.

1949 Patna 309 Affirmed. (MUKHERJEA J.)

Siddeshwar Mukherjee v. *Bhubaneswar Prasad Narain Singh*, 1953 SC 487 : 1954 SCR 177 : 1953 SCJ 700 : 67 LW 1 : 1954 SCA 216 : 9 DLR SC 39 : 1954 ALJ 54 : 1953 (2) MLJ 789 : (1954) Pat 1 : 2 BLJ 65.

8. MAINTENANCE

Illegitimate son.

Under the Mitakshara Law an illegitimate son is entitled to maintenance as

long as he lives, in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes.

17 Mad 160 Approved.

The fact that the entire income from the family properties was being enjoyed by an adopted son alone is hardly a relevant consideration in fixing the rate of maintenance. (FAZL ALI J.)

A. R. Raj Kumar v. *Koney Narayana Rao*, 1953 SC 433 : 1952 SCJ 507 : 65 LW 1 : 1952 (2) MLJ 342.

9. MARRIAGE—MALABAR LAW

Proof of Sarwaswadanam marriage.

See 1958 SC 832.

10. PARTITION

Division in status.

A division in status can be effected by an unambiguous declaration to become divided from the others and such intention can be expressed by any process. An unregistered instrument can effect a separation in status. Though *prima facie* a document clearly expressing such an intention brings about a division in status, it is open to a party to prove that the said document was a sham or nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. (SUBBA RAO J.)

Rukhmabai v. *Laxminarayanan*, 1960 SC 335 : 1960 (2) SCR 253 : 1960 SCJ 433 : 1960 (1) SCA 624.

When effected—Suit by next friend of minor.

As regards coparceners who are *sui juris*, the filing of a suit for partition is a clear expression of an intention to become separate. In the case of minors when the law permits a person interested in the minor to act on his behalf, any declaration to become divided made by him results in severance in status subject only to the Court deciding whether it is beneficial to the minor. A suit instituted on his behalf if found to be beneficial, therefore brings about a division in status. The true effect of a decision of a Court that the action is beneficial to the minor is not to create in the minor *proprio vigore* a right which he did not possess before but to recognise the right which had accrued to him when the person acting on his behalf instituted the action. Thus what brings about the severance in status is the action of the next friend in instituting the suit, the decree of Court merely rendering it effective by 'deciding that what the next friend has done is for the benefit of the minor.'

57 Mad 95 Approved ; 41 Mad 442 and 42 A11 461 Overruled.
(VENKATARAMA IYER J.)

Kakkumanu Peddasubbayya v. *Kakkmanu Akkamma*, 1958 SC 1042 : 1959 SCR 1249 : 1959 SCJ 138 : 1959 (1) An WR 60 : 1959 (1) MLJ 60 : 1959 SCA 19.

Illegitimate son.

The illegitimate son of a sudra by a continuously kept concubine has the status of a son and is a member of the family. The share of inheritance given to

him is not merely in lieu of maintenance but in recognition of his status as a son. When the father has left no separate property and no legitimate son, but was joint with his collaterals, the illegitimate son is not entitled to demand partition of the joint family property in their hands but is entitled as a member of the family to maintenance out of that property.

1931 P.C. 294 Ref. to.

The illegitimate son does not acquire by birth any interest in his father's estate and cannot therefore demand partition against his father during the father's lifetime. On the father's death, the illegitimate son succeeds as a coparcener to the separate estate of the father along with the legitimate son(s) with rights of survivorship and is entitled to enforce partition against the legitimate son(s). On a partition between a legitimate son and an illegitimate son the illegitimate son takes only one half of what he would have taken if he was a legitimate son.

(FAZL ALI J.)

Gur Narain Das v. *Gur Tahal Das*, 1952 SCR 869 : 1952 SC 225 : 1952 SCJ 305 : 1952 (2) MLJ 251 : 1952 MWN 507 : 90 CLJ 86 : 65 LW 642 : BLR 1952 SC 259 : 7 DLR SC 377 : 1952 SCA 575.

Minor—setting aside a partition.

It is only in cases where the partition is not effected by a decree of Court (by consent or otherwise) that a minor can have a partition set aside on the single ground of unfairness to him ; Mulla's Hindu Law 10th Edn. p. 394, S. 308 (2) Approved.

In cases of partition between members of a joint family when one of the members is a minor who can never consent to the partition in law, if he, on attaining majority, is able to show that the division was unfair and unjust, the Court will certainly set it aside. The rule, however, does not apply to decrees if the minor is properly represented before the Court and the decree is as binding on him as on the adult parties, unless the minor can show fraud or negligence on the part of his next friend or *guardian ad litem*. (BOSE J.)

Bishundeo v. *Seogeni Rai*, 1951 SC 280 : 1951 SCR 548 : 1951 SCJ 413 : BLR 1951 SC 257 : 6 DLR (SC) 255 : 1952 SCA 388 : 1951 ALJ 127 : 89 CLJ 73 : 64 LW 971 : 30 Pat 947.

Suit by minor—Benefit of the minor.

In a suit for partition by a minor, it was contended that a purchase of property in the name of other coparceners was made with the funds of the joint family and therefore it was available for partition. The defendants contested the claim and contended that the property was their separate property. The trial Court and the first appellate Court found that the purchase was not shown to have been made with the separate funds of the defendants but that as the purchase was before the plaintiff was born the minor could not rely on them as furnishing him a cause of action for the suit and dismissed the suit.

Held, these were materials from which it could be concluded that it was not to the interest of the minor to continue joint with the defendants and that it would be beneficial for him to decree partition. *Held* also, as the lower Courts had misunderstood the real point for determination, the High Court had rightly interfered with their finding in second appeal. (VENKATARAMA IYER J.)

Kakkumanu Peddasubbayya v. *Kakumanu Akkamma*, 1958 SC 1042 : 1958 SCA 19 : 1959 SCJ 138 : (1959) 1 An WR 60 : (1959) 1 MLJ 60 : 1959 SCR 1249.

Partial partition.

Prima facie the question whether at a partition between members of a joint family certain property was left undivided is a question of fact depending upon appreciation of evidence. (SHAH J.)

Devidas v. *Srishalappa*, 1961 SC 1277.

Subsequent joint residence.

Except in the case of reunion, the mere fact that the separated coparceners choose to live together or act jointly for the purposes of business or trade or in their dealings with their properties will not give them the status of coparceners under the Mitakshara Law. (MUKHERJEA J.)

Bhagawati Prasad v. *Ramashwari Kuer*, 1952 SC 72 : 1952 SCJ 115 : BLR 1952 SC 106 : 7 DLR (SC) 229 : 1951 SCR 603.

Statements of members—evidentiary value.

In deciding the question whether there has been a partition amongst the members of the family or not, contradictory statements made by members, to meet a partiticular contingency or to get an advantage, that there had been a partition and also contra, cannot be of much value and the question has to be decided not on such statements but on the basis of the relationship of the various parties with the joint estate. (SUBBA RAO J.)

Rukhma Bai v. *Laxminarayan*, 1960 SC 335 : 1960 (2) SCR 253 : 1960 SCJ 433 : 1960 (1) SCA 624.

Proof of—evidence of separated member.

The statement of a person that he is separated from a joint family of which he was a coparcener and that he has no further interest or claim in the joint property is, after he is dead, relevant under section 32(3) of the Evidence Act. The assertion that there was separation not only in respect of himself but between all the coparceners will be admissible as a connected matter and an integral part involved in and knit up with the same statement.

(1867) 2 QB 326 and Wigmore on Evidence p. 1465 Referred to.
(MUKHERJEA J.)

Bhagwati Prasad v. *Rameshwari Kuer*, 1952 SC 72 : 1952 SCJ 115 : BLR 1952 SC 106 : 7 DLR (SC) 229 : 1951 SCR 603.

Owelty, provision for—charge.

When an owelty is awarded to a member on partition for equalisation of the shares on an excessive allotment of immoveable properties to another member of the joint family such a provision of owelty ordinarily creates a lien or a charge on the land taken under the partition. A lien or a charge may be created in express terms by the provisions of the partition decree itself. There would thus be the creation of a legal charge in favour of the member to whom such owelty is awarded. If however no such charge is created in express terms even so the lien exists because it is implied by the very terms of the partition in the absence of an express provision in that behalf. The member to whom excessive allotment of property has been made on such partition cannot claim to acquire properties falling to his share irrespective of or discharged from the obligation to pay owelty to the other members. What he gets for his share is therefore the pro-

perties allotted to him subject to the obligation to pay such owelty out of the properties allotted to his share and a corresponding lien in favour of the members to whom such owelty is awarded on the properties which have fallen to his share. (BHAGWATI J.)

T. S. Swaminatha Udayar v. *Official Receiver, West Tanjore*, 1957 SC 577 : 1957 SCA 962 : 1957 SCJ 501 : 1957 (2) MLJ 53 : 1957 All WR 612 : 1957 (2) An WR 53.

11. RELIGIOUS ENDOWMENT.

Creation of—formalities if required.

An endowment can validly be created in favour of an idol or temple without the performance of any particular ceremonies provided the settlor has unambiguously expressed his intention in that behalf. Where it is proved that ceremonies were performed it would be valuable evidence of endowment, but absence of such proof would not be conclusive against it. (VENKATARAMA IYER J.)

Deoki Nandan v. *Murlidar*, 1956 SCR 756 : 1957 SC 133 : 1957 SCJ 75 : 1957 SCA 85 : 1957 BLJR 355 : 1957 (1) MLJ 28 : 1957 All WR 538 : 1957 ALJ 416 : 1957 MPLJ 214 : 1957 (1) An WR 28 : 1957 Nag LJ 142 : 1956 SCC 528 : 1957 MPC 231.

Oral dedication.

Under the Hindu Law it is well settled that dedication to charity need not necessarily be by an instrument or grant, though in many cases there are grants or gifts showing dedication. The dedication can be established by cogent and satisfactory evidence of conduct of parties and user of the property showing the extinction of the private secular character of the property and its complete dedication to charity. (GAJENDRAGADKAR J.)

M. Dasaratharama Reddi v. *D. Subba Rao*, 1957 SC 797 : 1957 SCJ 835 : 1957 (2) MLJ 175 : 1957 (2) An WR 175 : 1958 An LT 1.

***Cy pres* doctrine.**

Where the entries in the inam register show that when the grant was made the specific charitable payments exhausted the income of the property, it may be inferred therefrom that the intention was to devote the whole income to charity and any subsequent increase in the value of the property accrues to the charity. In such a case the Court will be justified in applying the *cy pres* doctrine and holding that the whole of the income is to go to the Deity even though it exceeds the expenditure for the particular service for which the grant was made.

74 Ind. App. 230 Followed. (KAPUR J.)

Lakshminarasimhachari v. *Sri Agastheeswaraswamy*, 1960 (2) SCR 768 : 1960 SC 622 : 1960 SCJ 954 : 1960 (2) MLJ 61 : 1960 (2) And. WR 61.

Dedication—whether partial or complete—determination.

Dedication of property to religious or charitable purposes may be either complete or partial. If the dedication is complete a trust in favour of public religious charity is created. If the dedication is partial, a trust in favour of the charity is not created but a charge in favour of the charity is attached to and follows the property which retains its original private and secular character. Whether or not dedication is complete would naturally be a question of fact to

be determined in each case in the light of the material terms used in the document. In such cases it is always a matter of ascertaining the true intention of the parties which must be gathered on a fair and reasonable construction of the document considered as a whole. The use of the words 'Trust' or 'Trustee,' though, no doubt, of some help, cannot be treated as decisive of the matter.

In cases where documents purport to dedicate property in favour of public charity and provision is also made for the maintenance of the manager or worshipper who may be a member of the family of the original owner of the property himself, the question arises whether the provision for maintenance from the income of the property indicates an intention that the property while retaining its original character should merely be burdened with an obligation in favour of the charity.

If the income is substantially intended to be used for the charity and only an insignificant portion of it is to be used for the maintenance of such person, it may be possible to take the view that the dedication is complete while, if for the charity only a minor portion is expected or required to be used and a substantial surplus is left in the hands of the person for own private purposes, it would be difficult to accept the theory of complete dedication. (GAJENDRAGADKAR J.)

M. Dasaratha Rami Reddi v. *D. Subba Rao*, 1957 SC 797 : 1957 SCJ 835 : 1957 (2) MLJ 175 : 1957 (2) An WR 175 : 1958 An. LT 1.

Worship at tomb of private individual.

So far as the textual Hindu Law in concerned what acts conduce to religious merit and justify a perpetual dedication of property therefor is fairly definite. No doubt the list given by Hindu Law writers is not exhaustive but they indicate that what conduces to religious merit is primarily a matter of shastraic injunction. To the extent therefore, that any purpose is claimed to be a valid one for perpetual dedication on the ground of religious merit, though lacking in public benefit, it must be shown to have a shastraic basis so far as Hindus are concerned. No doubt since then other religious practices and beliefs may have grown up and obtained recognition from certain classes, as constituting purposes conducive to religious merit. If such beliefs are to be accepted by Courts as being sufficient for valid perpetual dedication of property therefor without the element of actual or presumed public benefit to the public it must at least be shown that they have obtained wide recognition and constitute the religious practice of a substantial and large class of persons. But it cannot be maintained that the belief in this behalf of one or more individuals is sufficient. The heads of religious purposes determined by belief in acquisition of religious merit cannot be allowed to be widely enlarged consistently with public policy and needs of modern society.

There is no widely accepted practice among Hindus of raising tombs and worshipping thereat and making endowments therefor, though no doubt there have been some instances of Hindu saints having been entombed and worshipped. Therefore perpetual dedication of property for worship at a tomb of an ordinary private individual is not valid among Hindus.

58 Mad 204, (1945) Mad 854, and 1946 Mad 485 Approved ; observation in 15 Mad 424 Disapproved. (JAGANNADHADAS J.)

Saraswathi Ammal v. *Rajagopal Ammal*, 1953 SC 491 : 1954 SCR 277 : 1953 SCJ 714 : 1954 SCA 1017 : 9 DLR SC 7 : 67 LW 7 : 1954 ALJ 136 : 1953 (2) MLJ 803 : 1954 MWN 1 : 2 BLJ 191.

Public and Private Trusts.

Under the Hindu Law, unlike the English law, there can be a religious trust of a private character. The essential distinction between public trusts and private trusts is that in the former the beneficial interest is vested in an uncertain and

fluctuating body of persons, either the public at large or a considerable portion of it answering a particular description ; while in the latter the beneficiaries are definite and ascertained individuals or who within a definite time can be definitely ascertained. The fact that the uncertain and fluctuating body of persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion would not make any difference in the matter and would not make the trust a private trust. (S. K. DAS J.)

(*Mahant*) *Ram Saroop Dasji* v. *S. P. Sahi*, 1959 SC 951 : 1959 Sup 2 SCR 583 : 38 Patna 661.

Distinction between private and public religious endowment.

The question as to the scope of a dedication is a mixed question of law and fact, the decision of which must depend upon the application of the legal concepts of a public and a private endowment to the facts found in a case.

The distinction between a public and a private trust is that whereas in the former, the beneficiaries are the general public or a class thereof, in the latter they are specific individuals. In the former the beneficiaries constitute a body which is incapable of ascertainment while in the latter they are persons who are ascertained or capable of being ascertained. (VENKATARAMA IYER J.)

Deoki Nandan v. *Murlidhar*, 1956 SCR 756 : 1957 SC 133 : 1957 SCJ 75 : 1957 SCA 85 : 1957 BLJR 355 : 1957 (1) MLJ 28 : 1957 All WR 358 : 1957 MPLJ 214 : 1957 (1) An WR 28 : 1957 Nag LJ 142 : 1957 ALJ 416 : 1956 SCC 528 : 1957 MPC 231.

It is only in an ideal sense that the temple is the owner of the endowed properties. The true beneficiaries of religious endowment are not the idols but the worshippers. In any dispute as to the character of the endowment, the cardinal point to be decided is whether the intention of the founder is that specified individuals have the right of worship at the shrine or the general public or any specified portion thereof. When property is dedicated to a family idol it is only a private endowment. But where the beneficiaries are not members of a family or a specified individual, then the endowment can only be regarded as public, intended to benefit the general body of worshippers. (VENKATARAMA IYER J.)

Deoki Nandan v. *Murlidhar*, (*ibid.*)

User by public.

The question of intention to dedicate a place for the use of the public or of the user by the public being as a matter of right is neeessarily a matter for inference from the nature of the institution and its user and the way the institution has been administered. Once a long course of user by the public for the purpose of worship is established and the fact of a separate endowment in trust for the Deity is also proved, it is fair to infer that the institution must have been dedicated for user by the public (unless the contrary is established)—particularly when the character of the temple, its construction, the arrangement of its various parts and the nature of the Deities installed are similar to what obtains in what are admittedly public temples.

Similarly when user by the public generally to the extent to which there is a worshipping public in the locality is established, it is not unreasonable to presume that the user by the public was as of right unless there are circumstances clearly suggesting that the user must have been permissive or that the authorities have been exercising such arbitrary powers of exclusion that can only be ascribed to the private character of the institution. (HIDAYATULLAH J.)

Narayan v. *Gopal*, 1960 (1) SCR 773 : 1960 SC 100 : 1960 SCJ 263 : 1960 (2) SCA 153.

When the endowment is in favour of the idol itself and not in the name of an individual, proof of user by the public without interference will be cogent evidence that the dedication was in favour of the public.

Circumstances indicating that dedication is for the public stated.
(VENKATARAMA IYER J.)

Deoki Nandan v. *Murlidhar*, 1956 SCR 756 : 1957 SC 133 : 1957 SCJ 75 : 1957 BLJR 355 : 1957 (1) MLJ 28 : 1957 SCA 85 : 1956 SCC 528 : 1957 All LJ 416 : 1957 All WR 358 : 1957 Nag LJ 142 : 1957 (1) An WR 28 : 1957 MPLJ 214.

Shebaitship—nature of.

The exact legal position of a shebait may not be capable of precise definition but its implications are fairly well established. Though a shebait is a manager and not a trustee in the technical sense, shebaitship is not a mere office. Even where no emoluments are attached to the office, the shebait enjoys some sort of right or interest in the endowed property which partially at least has the character of a proprietary right. Thus in the conception of shebaiti both the elements of office and property, duties and personal interest are blended together. It is the presence of personal or beneficial interest which attaches to shebaitship the legal incidents of property. (MUKHERJEA J.)

Angurbala v. *Debabrata*, 1951 SC 293 : 64 LW 960 : 1951 SCR 1125 : BLR 1951 SC 285 : 6 DLR (SC) 273 : 1951 ALJ 132 : (1952) 2 Cal. 209.

Whether shebaitship is property.

Whatever might be said about the office of a trustee which carries no beneficial interest with it, a shebaitship, as is now well settled, combines in it both the elements of office and property and is heritable. (MUKHERJEA J.)

Kalipada Chakraborti v. *Palani Bala Devi*, 1953 SC 125 : 1953 SCR 503 : 1953 SCJ 209 : 1953 SCA 171 : 91 CLJ 252 : 1953 (1) MLJ 597 : 66 LW 524 : 8 DLR SC 228.

Mathadipathi.

In the conception of mahantship as in shebaitship both the elements of office and property, of duties and of personal interest, are blended together and neither can be detached from the other. The personal or beneficial interest of the mahant in the endowments attached to an institution is manifested in his large powers of disposal and administration and his right to create derivative tenures in respect to endowed properties ; and these and other rights of a similar character invest the office of Mahant with the character of proprietary right which, though anomalous to some extent, is still a genuine legal right. (MUKHERJEA J.)

Commissioner H. R. E. Madras v. *Lakshmindra Thirtha Swamiar*, 1954 SC 282 : 1954 SCR 1005 : 1954 SCJ 335 : 1954 SCA 415 : 1954 (1) MLJ 596 : 67 LW 1220 : 1954 MWN 363 : 20 CLT 250 : 1954 VLJ SC 1.

Pandas—**Right of entry into a public temple.**

Once it is admitted that a temple is a public place of worship of the Hindus, the right of entrance into the temple for purposes of "Darshan" or worship is a right which flows from the nature of the institution itself and for the acquisition of such rights no custom or immemorial usage need be asserted or proved. As the *Panda* is a Hindu worshipper there can be nothing wrong in his accompanying his "Yejaman" or client inside the temple. But if the *Pandas* claim any special right which is not enjoyed ordinarily by the members of the Hindu public, they

would undoubtedly have to establish such rights on the basis of custom, usage or otherwise.

But this right of entry is not an unregulated or unrestricted right. It is open to the trustees of a public temple to regulate the time of public visits and fix certain hours of worship or to deny access to certain particularly sacred parts of the temple. Apart from these it is always competent to the temple authorities to make and enforce rules to ensure good order and decency of worship and prevent overcrowding in the temple.

Held that the byelaw made by the Bhadrinath Temple Committee under the U.P. Badrinath Temple Act of 1939, laying down in substance that whatever gift a pilgrim might be desirous of making and which is unconnected with the offerings to the Deity shall be made outside the temple precincts and not inside it, was validly made for the purpose of preventing overcrowding in the Temple and to ensure order, decency and worshipful behaviour on the part of those who enter it.
(MUKHERJEA J.)

Narhari v. *Badrinath Temple Committee*, 1952 SC 245 : 1952 SCR 849 : 1952 SCJ 310 : 1952 (2) MLJ 255 : BLR 1952 SC 279 : 1952 SCA 664 : (1953) 1 All 42 : 7 DLR SC 352.

12. SUCCESSION

Co-widows.

Co-widows succeed as co-heirs to the estate of their deceased husband and take as joint tenants with rights of survivorship. No one of them is entitled to enforce an absolute partition of the estate against the others so as to destroy their rights of survivorship. But they are entitled to obtain a partition of separate portions of the property so that each may enjoy her equal share of the income accruing therefrom. (S. K. DAS J.)

Commissioner of Income-tax, Bombay v. *Indira Balakrishna*, 1960 SC 1172 : 1960 (3) SCR 513 : 1961 (1) SCJ 153 : 39 ITR 546 : 63 Bom LR 197.

Custom—failure to prove.

The plaintiff had pleaded a custom whereby a sister was entitled to succeed in preference to the collateral relations of her brother while the defendant had set up a general custom of exclusion of sisters from inheritance. It was held that the custom set up by the defendant had not been proved while the custom set up by plaintiff had been proved.

Held, even if the plaintiff had been unable to prove the custom set up by her she was entitled to succeed on the basis of the personal law of the parties namely Hindu Law, even though no such alternative claim was made in the plaint, especially since that course would not result in any prejudice to the defendant.

2 Lah 98 Approved. (SARKAR J.)

Ujagar Singh v. *Mst. Jeo*, 1959 SC 1041 : 1960 SCJ 16 : 1959 Sup 2 SCR 781 : (1959) Punj 1735.

Dancing girl—Mitakshara law.

Degradation of a woman does not and cannot sever ties of blood and succession is more often than not determined by ties of blood than by the moral character of the heir. A rule that degraded people are a class by themselves and their degraded relations are to be preferred to their undegraded relations in matters of succession cannot be evolved merely on logical grounds. The existence can only be justified on the basis of established custom.

Observation in 23 Mad 171 at p. 177 Approved.

In the absence of proof of existence of a special custom governing succession to the property of a *dasi*, succession will be governed by rules of justice, equity and good conscience because no clear text of Hindu Law applies to such a case. The just rule to apply will be one of propinquity, *viz.*, married daughters and *dasi* daughters sharing equally.

1950 Mad 303 Affirmed. (MAHAJAN J.)

Saraswathi Ammal v. *Jagadambal*, 1953 SC 201 : 1953 SCR 939 : 1953 SCJ 287 : 1954 SCA 239 : 8 DLR SC 266 : 1953 (1) MLJ 697 : 1953 AWR 394 : 66 LW 540.

Illegitimate son—rights of.

An illegitimate son of a Sudra has the status of a son under the Hindu law and he is a member of the family. But his rights are limited compared to those of a son born in wedlock. He has no right by birth and therefore cannot demand partition during his father's lifetime. But on his father's death he takes his father's self-acquired property along with the legitimate son and in case the legitimate son dies he takes the entire property by survivorship. Even if there is no legitimate son, the illegitimate son would be entitled to a moiety only of his father's estate when there is a widow, daughter or daughter's son of the last male holder. In the absence of anyone of these heirs he succeeds to the entire estate of his father.

An illegitimate son of a *Sudra* after having succeeded to a half share of his putative father's self-acquired property along with his widow will be entitled to the other half share got by the widow also after succession opens out to his putative father on the death of the said widow, for once it is established that for the purpose of succession an illegitimate son of a *Sudra* has the status of a son, and that he is entitled to succeed to his putative father's entire self-acquired property in the absence of a son, widow, daughter or daughter's son and to a share along with them, it follows logically that he will be entitled to the other half share when succession opens after the widow's death, for the intervention of the widow only postpones the opening of succession to the extent of that half share but it cannot divert the succession through a different channel as she cannot constitute herself a new stock of descent.

Observation in Mayne's Hindu Law 11th ed. Page 637 Not Approved ; 55 Mad 856 Explained. (1938) Nagpur 255 Approved. (SUBBA RAO J.)

Singhai Ajit Kumar v. *Ujayar Singh*, 1961 SC 1334.

Custom (Punjab).

According to the custom among agricultural *Jats* in Punjab the daughter is preferred to the collaterals in regard to the acquired property of her father, and after her, her sons will exclude the collaterals.

32 Punj Re 1895 (FB) and 1953 Punj 202 Referred to. (BOSE J.)

(**Note** :—The Court did not express any opinion as to what would happen if the daughter predeceased the father or in the case of ancestral property as these questions did not fall to be decided in the instant case).

Gopal Singh v. *Ujagar Singh*, 1954 SC 579 : 1955 (1) SCR 86 : 1954 SCJ 562 : 1955 SCA 223 : 9 DLR SC 290.

Disability—insanity.

Under the Hindu Law, insanity, to be a ground of exclusion from inheritance, need not be congenital and insanity at the time succession opens is enough,

5 All 509, 10 Cal 639, and 43 Mad 464 Approved ; 14 Mad 289 Overruled.
(HIDAYATULLAH J.)

Muthammal v. *Subramaniaswamy Devasthanam*, 1960 (2) SCR 721 : 1960 SC 601 : 1960 SCJ 963 : 1960 (2) MLJ 64 : 1960 (2) An WR 64.

(**Note** :—This position of law applies only to cases in which succession opened before the commencement of the Hindu Law of Inheritance Amendment (Removal of Disabilities) Act, 1929).

Ghatwali **tenure.**

The incidents attaching to a Birbhum *Ghatwali* tenure rule out the existence of any notion of community of interest and unity of possession of the members of the family of the holder for the time being with him. He is entitled to be maintained in exclusive possession of the *Ghatwali* lands and devolution of the property is to him in the status of a sole heir. Therefore after the death of the holder, his widow will be entitled to succeed, under the Mitakshara law, in preference to an agnatic relation of the deceased, *viz.*, the eldest member of the eldest surviving line of the descendants of the common ancestor. The contention that the widow not being a "descendant" of the grantee under the terms of Regulation XXIX (29) of 1814 is not entitled to inherit cannot be accepted, for the expression "descendants", which has been loosely employed in the Regulation for the word "heirs," cannot deprive females, like a widow or a mother, from inheriting where they are legal heirs under the Mitakshara Law or under custom.
(MAHAJAN J.)

Hargobind Prasad Singh v. *Phaldani Kumari*, 1952 SC 38 : 1951 SCJ 824 : 31 Patna 35 : 1952 SCR 153.

Illatom **son-in-law.**

In Andhra an *illatom* son-in-law is a boy incorporated in the family with a view to give him a daughter in marriage and is customarily regarded as an heir in the absence of a natural born son. (JAGANNADHADAS J.)

P. Lakshmi Reddy v. *L. Lakshmi Reddy*, 1957 SCR 195 : 1957 SC 314 : 1957 SCA 197 : 1957 SCJ 248 : 1957 (1) MLJ 46 : 1957 (1) Andh WR 46.

Mahantship.

It is well settled that succession to mahantship of a *Math* or religious institution is regulated by custom or usage of the particular institution except where a rule of succession has been laid down by the founder himself who created the endowment.

Mere infirmity of title of the defendant in possession will not help the plaintiff who must show that he is entitled according to the custom to recover the office and the property belonging to it. (MUKHERJEA J.)

Sital Das v. *Sant Ram*, 1954 SC 606.

Mahantship of the Temple of Bhaironji—Custom in Punjab.

Among Avdhut Jogis of the Bhaironji temple in the Punjab, succession devolves from *Guru* to *Chela* and if one *chela* does not survive then it devolves upon the other *chela* meaning thereby the other *Chela* of the last Mahant who would thus be the *Gurbhai* of the *chela* who died.

The succession would thus be in the line of descent from the last Mahant who was the representative of the particular line *qua* whom it would be determined whether his *chela* or *chelas* succeed to his property.

The succession from *guru* to *chela* only means the devolution of property from the last representative of the line to his *chela* and when one talks of the succession from one *chela*, on his death, to another *chela*, it is also to another *chela* of the *guru* who is the last representative of the line. When one talks similarly of the extinction of the line, it only means that when the last representative of that particular line dies without leaving a *chela* or *chelas* or a *Gurbhai* who could succeed to his estate that line becomes extinct and one has not got to go backwards in order to ascertain whether there is any *chela* of any *Guru* in that line at all surviving but succession goes to the representative of the other line. (BHAGWATI J.)

Prithi Nath v. *Birkha Nath*, 1956 SC 192.

Mayukha Law—Paternal uncle's son.

Under the Mitakshara law of succession the place of the paternal uncle's son is much higher than that of the sister's son. The Mayukha law prevailing in Bombay State is not different in this respect. (MUKHERJEA J.)

Annagouda Nathgouda v. *Court of Wards, Satara*, 1952 SC 60 : 1952 SCR 208 : 1952 SCJ 20 : 1952 (1) MLJ 414 : BLR 1952 SC 94 : 54 Bom LR 395 : 65 LW 359 : 7 DLR SC 126.

Prostitute—Mitakshara law.

The text of Mitakshara dealing with the case of a virgin laying down principles of preference concerning unmarried daughters cannot be applied to the case of a prostitute.

31 Bom 495 Approved. (MAHAJAN J.)

Saraswathi Ammal v. *Jagadambal*, 1953 SC 201 : 1953 SCR 939 : 1953 SCJ 287 : 1954 SCA 239 : 8 DLR SC 266 : 1953 (1) MLJ 697 : 1953 AWR 394 : 66 LW 540.

'Pujari' and 'Panda'—succession to office of.

That religious offices can be hereditary and that the right to such an office is in the nature of property under the Hindu Law is now well-established. But it involves also substantial elements of duty. It must be recognised that in respect of such offices especially where they are attached to public institutions, the duties are to be regarded as primary and that the rights and emoluments are only appurtenant to the duties.

If, therefore, it is found that the recognition of a female's right to succeed to the hereditary office of a pujari held by her husband is incompatible with due discharge of the duties of the office, her right to succeed must be negatived. The question requiring consideration, therefore, is whether the office involves such duties as cannot be discharged by a female in person and if so whether she is also incompetent to get the same discharged by a deputy. It is undisputed that according to the Hindu Shastras the functions of a 'Pujari' can be performed only by certain limited classes and involves special qualifications and that these classes may vary with the nature of the institution.

It appears to have been well established in later times that a female, even of the recognised limited classes, cannot by herself perform the duties of a 'Pujari.' Even at a time when the institution of temple worship had probably not come into general vogue, the incapacity of a woman to recite vedic texts, to offer sacrificial fire or to perform sacramental rites is indicated in certain texts of Manu.

It is a matter of common knowledge that, at the present day, hereditary priestly offices are, as often as not, performed by proxies, the choice of proxy being, of course, limited to a small circle permitted by usage,

A careful review of the reported cases on this matter shows that the usage of a female succeeding to a priestly office and getting the same performed through a competent deputy is one that has been fairly well recognised. There is nothing in the textual Hindu Law to the contrary. Nor can it be said that the recognition of such a usage is opposed to public policy, which can be given effect to the extent required for enforcing adequate discharge of the duties appurtenant to the office. Subject to the proper and efficient discharge of the duties of the office, there can be no reason either on principle or on authority to refuse to accord to a female the right to succeed to the hereditary office held by her husband and to get the duties of the office performed by a substitute excepting in cases where usage to the contrary is pleaded and established.

If the temple is a private one or the idol is not one shastraically consecrated, the case in favour of the female will be stronger.

Case Law Reviewed. 28 Patna 608 Reversed. (JAGANNADHADAS J.)

Mst. Raj Kali Kuer v. *Ram Rattan*, 1955 (2) SCR 186 : 1955 SC 493 : 1955 SCA 636 : 1955 SCJ 493 : 1955 BLJR 442 : 1955 (2) MLJ 49 : 1955 ALJ 525 : 1955 MWN 790 : 34 Pat 530.

Shebaitship.

Assuming that shebaitship is not property (The Court expressly held that shebaitship is property within the meaning of S. 3 (1) of Act XVIII of 1937), succession to shebaitship is also governed by the law of succession for the time being. (MUKHERJEA J.)

Angurbala v. *Debabrata*, 1951 SC 293 : 64 LW 960 : 1951 SCR 1125 : BLR 1951 SC 285 : 6 DLR (SC) 275 : 1951 ALJ 132 : (1952) 2 Cal 209.

Stridhana—Mitakshara Law.

In respect of Stridhana property of a maiden governed by Mitakshara Law, the father's paternal uncle's son succeeds in preference to the father's sister's son. (MUKHERJEA J.)

Annagouda Nathgouda v. *Court of Wards, Satara*, 1952 SC 60 : 1952 SCR 208 : 1952 SCJ 20 : 1952 (1) MLJ 414 : BLR 1952 SC 94 : 54 Bom LR 395 : 65 LW 359 : 7 DLR (SC) 126.

13. WIDOW

Adverse possession against—effect of surrender.

There is no warrant in Hindu Law for the proposition that, in case of an alienation by a widow of her husband's property without any justifying necessity, or in the case of a stranger acquiring title by adverse possession against her, the interest created is to be deemed to be severed from the inheritance and if surrender is made subsequently by the widow the surrenderee must take it subject to the prior interest. These rights have their origin in acts or omissions of the widow which are not binding on the husband's estate. They are in reality dependent upon the widow's estate and if the widow's estate is extinguished by any means known to law, e.g., by her adopting a son or marrying again, these rights also must cease to exist. The same consequences should follow when the widow withdraws herself from the husband's estate by an act of renunciation on her part.

Case law discussed ; 1935 Mad 664, 1951 Mad 753, 49 All 334 and 1935 Patna 175 Overruled ;

39 Mad 1035, 48 Mad 933 and 1953 Mad 550 Disapproved ;

Observation of SULAIMAN J. in 49 All 334 Approved ; 1950 Bom 55 Affirmed. (MUKHERJEA J.)

Natvarlal v. *Dadubhai*, 1954 SC 61 : 1954 SCR 339 : 1954 SCJ 34 : 1954 SCA 1000 : 9 DLR SC 89 : 1954 ALJ 81 : 56 Bom LR 447 : 1954 (1) MLJ 69 : 1954 MWN 209 : 2 BLJ 89 : 67 LW 954.

Alienation without necessity—rights of alienee.

It is not correct to say that in cases where a Hindu widow alienates her husband's property without any necessity, the transferee acquires necessarily an interest commensurate with the period of the natural life of the widow. Such a transfer is invalid under Hindu Law but the widow being the grantor herself cannot derogate from the grant and the transfer cannot also be impeached so long as a person does not come into existence who can claim a present right to possession of the property (i.e. when the widow adopts, remarries or dies). As in the majority of cases persons with such rights come into existence only when the widow dies it is generally said that the alienee gets the estate for the term of the widow's life. (MUKHERJEA J.)

Natvarlal v. *Dadubhai*, (*ibid.*).

Consent to alienation.

Once a reversioner has given his assent to an alienation, whether at the time, or as a part of the transaction, or later as a distinct and separate act, 'he' is bound though others may not be, and having given his assent he cannot go gack on it to the detriment of other persons ; all the more so when he himself receives a benefit. (BOSE J.)

Sahu Madho Das v. *Mukan Ram*, 1955 (2) SCR 22 : 1955 SC 481 : 1955 SCA 1057 : 1955 SCJ 417 : 1955 (2) MLJ 1 : 1955 MWN 919 : (1955) 2 All 177.

Consent of reversioner.

A presumptive reversioner who joins the widow in an alienation must be deemed to have consented to the transaction. Such consent may raise a presumption that the transaction was for legal necessity or that the alienee had acted after proper and bonafide enquiry and had satisfied himself as to the existence of such necessity. But this presumption is rebuttable and it is open to the actual reversioner to establish that there was in fact no legal necessity and there had been no proper and bonafide enquiry by the alienee. (MUKHERJEA J.)

Kalishankardas v. *Dhirendra Nath*, 1954 SC 505 : 1955 (1) SCR 467 : 1954 SCJ 670 : 1955 SCA 309 : 1954 (2) MLJ 351 : 67 LW 776 : 1954 MWN 769.

Ratification by reversioner.

It is well settled that if a presumptive reversioner is a party to an arrangement which may properly be called a family arrangement and takes benefit under it, he would be precluded from disputing the validity of the said arrangement when reversion falls open and he becomes the actual reversioner. The doctrine of ratification also can be invoked against a presumptive reversioner who though not a party to the transaction, subsequently ratifies it with full knowledge of his rights by assenting to it and taking benefit under it. But a mere receipt of benefit under an arrangement by which a Hindu widow alienates the property of her husband would not preclude a presumptive reversioner from disputing the validity of the said alienation when he becomes the actual reversioner. It must always be a question of fact as to whether the conduct of the said reversioner on which a

plea of ratification is based does in law amount to ratification properly so called. (GAJENDRAGADKAR J.)

Subbu Chetty's Family Charities v. *Raghava Mudaliar*, 1961 (2) SCJ 9 : 1961 SC 797.

Consent of presumptive reversioner—whether binds actual reversioner.

A presumptive reversioner who joins the widow in an alienation must be deemed to have consented to the transaction. But such admission cannot bind his sons who are the actual reversioners for they claim as heirs of the last full owner and not of their father, it being a settled rule of Hindu Law that nobody has a vested right so long as the widow is alive and the eventual reversioner does not claim through any one who went before him.

Observation in 35 Ind. App. 1 Not Approved ; 46 Ind. App. 72 Referred to. (MUKHERJEA J.)

Kalishankardas v. *Dhirendra Nath*, 1954 SC 505 : 1955 (1) SCR 467 : 1954 SCJ 670 : 1955 SCA 309 : 1954 (2) MLJ 351 : 67 LW 776 : 1954 MWN 769.

Legal necessity.

If an alienee from a Hindu widow succeeds in establishing that there was legal necessity for the transfer, he is completely protected and it is immaterial that the necessity was brought about by the mismanagement by the widow herself.

Even if there is no necessity in fact, but it is proved that there was representation of necessity and the alienee after making bonafide enquiries satisfied himself as best as he could that such necessity existed, then the actual existence of a legal necessity is not a condition precedent to the validity of the sale.

6 M. I. A. 393 Referred to. (MUKHERJEA J.)

Kalishankardas v. *Dhirendra Nath*, (*ibid.*).

Compromise.

It is well settled that when the estate of a deceased Hindu rests in a female heir, any decree fairly and properly obtained against her is, in the absence of fraud or collusion, binding on the reversioner, but the decree must have involved the decision of a question of title and not merely the widow's possession during her life.

9. M.I.A. 516 Rel. on.

This principle of *Res judicata* is not limited to decrees in suits contested and a widow is competent to enter into a compromise in the course of a suit *bonafide* in the interest of the estate and not for her personal advantage and a decree passed on such a compromise will bind the reversioner. The question whther the transaction is a *bonafide* settlement of disputed rights between the parties depends on the substance of the transaction and in order that it may be binding, it should be a prudent and reasonable act in the circumstances of the case.

21 CLJ 157 and 1922 P.C. 356 Ref. to.

A compromise made in the interests of the parties to the suit in complete disregard of the interests of the ultimate reversioners is not binding on the ultimate reversioner. (MAHAJAN J.)

Mt. Phool Kuer v. *Mt. Pem Kur*, 1952 SC 207 : 1952 SCR 793 : 1952 SCJ 296 : 1952 ALJ 137 : 1952 (1) MLJ 823 : BLR 1952 SC 241 : 65 LW 1235 : 7 DLR SC 300 ; 1952 SCA 557 ; 1953 (2) All 195.

Gift by Widow—Validity.

On an examination of the authorities the following principles clearly emerge :—

1. It is the imperative religious duty and moral obligation of a father, mother or other guardian to give a girl in marriage to a suitable husband ;

2. A Hindu widow in possession of the estate of her deceased husband can make an alienation for religious acts which are not essential or obligatory but are still pious observances which conduce to the bliss of the deceased husband's soul ;

3. In the case of essential or obligatory acts, if the income of the property or the property itself is not sufficient to cover the expenses she is entitled to sell the whole of it but for acts which are pious and which conduce to the bliss of the deceased husband's soul she can alienate a reasonable portion of the property ;

4. Gifts by a widow of landed property to her daughter or son-in-law on the occasion of the marriage or any ceremonies connected with the marriage are well recognised in Hindu Law ;

5. If a promise is made of such a gift for or at the time of the marriage, that promise may be fulfilled afterwards and it is not essential to make a gift at the time of the marriage but it may be made afterwards in fulfilment of the promise.

A Hindu widow therefore can make a gift of a reasonable proportion of her husband's property in favour of her daughter two years after the marriage in fulfilment of an ante-nuptial promise made by her and such a gift will be binding on the reversioners.

Case Law discussed. (S. K. Das J.)

Kamala Devi v. *Bachulal Gupta*, 1957 SCR 452 : 1957 SC 434 : 1957 (1) MLJ 66 : 1957 SCA 290 : 1957 SCJ 321 : 1957 An LT 315 : 1957 (1) An WR 66.

Income from husband's estate.

There is no presumption that any particular property in the widow's hands is part of her husband's estate. Property purchased by a widow out of savings made by her from the income of her husband's estate does not necessarily become an accretion because a Hindu widow has an absolute right to the income and is not bound to save it for the reversioners. She can add it to the estate or if she wants, keep it separate and deal with it as her own. The question is one of intention and must be decided as one of fact.

14 Ind. App. 63, 48 Ind. App. 64 and 52 Ind. App. 214 Referred to.

Where the widow dedicated to the family Deities property purchased by her out of savings made by her from the income of her husband's estate, *held*, her intention was to keep it separate and the reversioner who had not shown anything indicating a contrary intention, could not attack the dedication.

1951 Patna 356 Affirmed. (Bose J.)

Sitaji v. *Bijendra Narain*, 1954 SC 601.

Surrender—nature of.

The widow's estate is an interposed limitation or obstruction which prevents or impedes the course of succession in favour of the heirs of her husband. It is open to the widow by a voluntary act of her own to remove this obstruction and efface herself from her husband's estate altogether. If she does that, the consequence is the same as if she died a natural death and the next heirs of the husband then living step in at once under the ordinary law of inheritance. Thus surrender is not an act of alienation of the widow of her right in favour of the

reversioner and the reversioner does not occupy the position of a grantee or transferee, though it is true that a surrender may, and in the majority of cases does, take the form of a transfer, *e.g.*, when the widow conveys the entire estate of her husband, without consideration and not merely as a device to share the estate with the reversioner, to the latter. It conveys nothing in law ; it is purely a self-effacement which must of necessity be complete ; for there cannot be a widow partly effaced, and partly not, just as there cannot be a widow partly dead and partly alive.

(1941) Mad. 551 Approved. (MUKHERJEA J.)

Natvarlal v. *Dadubhai*, 1954 SC 61 : 1954 SCR 339 : 1954 SCJ 34 : 1954 SCA 1000 : 9 DLR SC 89 : 1954 ALJ 81 : 56 Bom LR 447 : 67 LW 954 : 1954 (1) MLJ 69 : 1954 MWN 209 : 2 BLJ 89.

Acceptance not necessary.

Surrender is not an alienation and no acceptance by the reversioner is necessary as a condition precedent to the vesting of the estate in him. The estate vests in him under operation of law without any act on his part. (MUKHERJEA J.)

Natvarlal v. *Dadubhai*, (*ibid.*).

Surrender and adoption—distinction.

So far as the legal consequences are concerned, there is no material difference between an adoption and an act of surrender by the widow.

Observation of KUMARASWAMY SASTRI J. in 41 Mad 75 (FB) Disapproved. (MUKHERJEA J.)

Natvarlal v. *Dadubhai*, (*ibid.*).

Must be in favour of next heir.

The principle underlying the doctrine of surrender is that it cannot possibly be made in favour of anybody except the next heir of the husband. Vesting of the estate takes place under operation of law and the widow cannot say she is withdrawing herself from the husband's estate in order that it may vest in somebody other than the next heir of the husband. (MAHAJAN J.)

Mt. Phool Kuer v. *Pem Kuer*, 1952 SC 207 : 1952 SCR 793 : 1952 SCJ 296 : 1952 ALJ 137 : 1952 (1) MLJ 823 : BLR 1952 SC 241 : 65 LW 1235 : 7 DLR SC 300 : 1952 SCA 557 : 1953 (2) All 195.

Release in favour of daughter and son-in-law.

Where a Hindu widow executed a document styled a release, in favour of her daughter and son-in-law saying that as she was unable to look after her worldly affairs she was putting them in possession of all her properties to be enjoyed by them permanently from son to grandson and directed them to pay her maintenance annually.

Held, the deed of release did not operate as a surrender of the widow's estate.

1926 Cal 228 Overruled ; 60 Bom 211 Distinguished.

It will be quite consistent with established principles of law if the widow relinquishes her interest in the husband's estate and the reversioner in whom the property vests transfers the estate either in whole or in part to another person. If the transfer is of the entire estate the two transactions can be combined in one document and the widow and the reversioner might jointly transfer to a stranger the whole estate but the implication in such cases must always be that the alienee derives his title from the reversioner and not the widow. Extending this

doctrine and holding that the effect of the immediate reversioner consenting to the alienation of the whole estate by the widow is to import a double fiction, first of a surrender in favour of the consenting reversioner and secondly of a transfer by the latter to the alienee, seems rather far-fetched and somewhat anomalous, both fictions being contrary to actual facts.

10 Cal 1102 (FB) Doubted. (MUKHERJEA J.)

Mumma Reddi v. *Durairaja*, 1951 SCR 655 : 1952 SC 109 : 1952 SCJ 192 : 7 DLR (SC) 307 : BLR 1952 SC 142 : 1952 (1) MLJ 746 : 65 LW 519.

Must be complete and not partial.

Surrender or self-effacement to be of any consequence should be complete. A partial self-effacement is not a surrender in the true sense and does not accelerate succession.

Where a Hindu widow transferred to the reversioners all her property except 91.5 acres of land in which she reserved to herself cultivating rights and which also she subsequently gifted to them,

Held, the property retained was substantial and the surrender was not complete, and the subsequent gift did not advance the matter any further as neither the previous transfer nor the latter gift amounted to a valid surrender.

(1950) Nag 589 Affirmed. (IMAM J.)

Kamalabai v. *Sheo Shankar Dayal*, 1958 SC 914 : 1958 MPLJ 457.

See also *Jai Kaur* v. *Sher Singh*, 1960 SC 1118 : (1960) 2 Punj 615.

Retention of small part.

Where a widow made a gift of all her husband's properties to the reversioners (including property to which she had an absolute right) except a small dwelling house in which not only she but also those reversioners lived, *held*, her intention was to efface herself completely and the retention of a very small part of the whole property would not invalidate the surrender.

Observation in Mulla's Hindu Law (11th Edition), page 217 Approved. (BOSE J.)

Gopal Singh v. *Ujagar Singh*, 1954 SC 579 : 1955 (1) SCR 86 : 1954 SCJ 562 : 1955 SCA 223 : 9 DLR SC 290.

14. WIDOW'S ESTATE.

Creation by will.

It is now settled that a Hindu can confer by means of a will on his widow the same kind of estate which she would get by inheritance. The widow in such a case takes as a demisee and not as an heir. (MAHAJAN J.)

Lakshmana Nadar v. *Ramier*, 1953 SC 304 : 1953 SCR 848 : 1953 SCJ 410 : 1954 SCA 811 : 8 DLR SC 417 : 1953 (1) MLJ 834 : 1953 MWN 609.

Gift to female.

There is no warrant for the proposition that when a grant is made to a Hindu female she does not get an absolute interest in the property unless it is expressly conferred upon her.

24 W.R. 395 Approved.

The position, therefore, is that to convey an absolute estate to a Hindu female no express power of alienation need be given ; it is enough if words used are of such amplitude as would convey full rights of ownership.

The mere fact that a gift of property is made for the maintenance and residence of a female cannot be taken to be a *prima facie* indication of the intention of the donor that the donee was to enojy the property only during her life-time. The desire to provide maintenance and residence shows only the motive for the gift and cannot be read as a measure of the extent of the gift.

1933 PC 67 Followed ; 1944 All 17 Reversed. (MUKHERJEA J.)

Ramgopal v. *Nandlal*, 1951 SC 139 : 64 LW 547 : 1950 SCR 766 : 1950 SCJ 575 : 6 DLR (SC) 56 : 1951 ALJ 24 : BLR 1951 SC 134 : 88 CLJ 1.

To convey an absolute estate to a Hindu female no express powers of alienation need be given. It is enough if the words used are of such amplitude as would convey full rights of ownership.

1950 SCR 766 Followed. (MAHAJAN J.)

Nathoolal v. *Durga Prasad*, 1954 SC 355 : 1955 (1) SCR 51 : 1954 SCJ 557 : 1954 SCA 921 : 1954 Andh LJ SC 50 : 67 LW 641.

Property allotted in partition.

Under Mitakshara Law, property allotted to a female on partition stands on the same footing as property inherited by her.

39 Ind. App. 1 Rel. on. (S. K. DAS J.)

Kamala Devi v. *Bachulal Gupta*, 1957 SCR 452 : 1957 SC 434 : 1957 SCA 290 : 1957 SCJ 321 : 1957 Andh LT 315 : 1957 (1) An WR 66 : 1957 (1) MLJ 66.

HINDU LAW OF INHERITANCE (AMENDMENT) ACT, 1929—**Sridhana Succession.**

The Act does not make the four relations, *viz.*, son's daughter, daughter's daughter, sister and sister's son, statutory heirs under the Mitakshara Law in all circumstances and for all circumstances. It makes them heirs only when the propositus is a male and the property in respect to which it is sought to be applied is his separate property undisposed of by will. Hence the Act cannot be invoked to determine the heirs of a Hindu female in respect of her stridhan property.

(1947) Mad 23, 1950 Mad 196, 26 Pat 150, (1942) Nag 629 Approved ; (1939) Bom 228, 1937 Lah 196, 1944 Lah 442 and (1949) All 816 Overruled. (MUKHERJEA J.)

Annagouda Nathgouda v. *Court of Wards, Satara*, 1952 SC 60 : 1952 SCR 208 : 1952 SCJ 20 : 1952 (1) MLJ 414 : BLR 1952 SC 94 : 54 Bom LR 395 : 65 LW 359 : 7 DLR (SC) 126.

HINDU SUCCESSION ACT 1956, **S. 14—"possessed."**

The opening words "property possessed by a female Hindu" obviously mean that to come within the purview of the section the property must be in the possession of the female concerned at the date of the commencement of the Act.

The word "possessed" is used in a broad sense and in the context means the state of owning or having in one's hand or power. That possession might be either actual or constructive or in any form recognised by law, but unless the female Hindu, whose limited estate in the disputed property is claimed to have been trans-

formed into absolute estate under this section, was at least in such possession when the Act came into force, the section will not apply.

1957 Cal 557 Approved. (IMAM J.)

Kotturuswami v. *Veeravva*, 1959 SC 577 : 1959 Sup 1 SCR 968 : 1959 SCJ 437 : 1959 (1) MLJ 158 : 1959 Nag LJ 299 : 1959 Pat LR 31 : 1959 (1) An WR 158 : 1959 MPLJ 662.

HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937, **S. 3(1)—Property —shebaitship.**

The expression "any property" *prima facie* includes, unless something contrary can be spelt out from the other provisions of the Act, all forms or types of interest answering to the description of "property" in law. Of course, the property must be heritable property in respect of which alone the question of succession may legitimately arise. There is nothing in the Act leading to an inference that the expression "property" used in s. 3(1) has a limited or restricted interpretation and is not applicable to shebaitship which is recognised as property in Hindu law.

1949 Cal 278 Reversed.

The observations in *Umayal Achi* v. *Lakshmi Achi* (1945 FC 25) should be construed in the light of the facts and the actual decision in the case, namely that the act cannot govern succession to property in respect to which the propositus had no beneficial enjoyment. It is not possible on the basis of this decision to enumerate a broad rule of law that succession to shebaitship is not governed by the provisions of the Act.

1950 Mad 103 Approved. (MUKHERJEA J.)

Angurbala v. *Debabrata*, 1951 SC 293 : 64 LW 960 : 1951 SCR 1125 : BLR 1951 SC 285 : 6 DLR (SC) 273 : 1951 ALJ 132 : (1952) 2 Cal 209.

HOUSE RENT CONTROL ACTS.

BIHAR BUILDINGS (LEASE, RENT & EVICTION) CONTROL ACT, 1947, **S. 11(1) (a)—erroneous decision.**

The Act has entrusted the Controller with jurisdiction to determine whether there is non-payment of rent or not as well as the jurisdiction, on finding that there is non-payment of rent, to order eviction of the tenant. Therefore even if the Controller may be assumed to have wrongly decided the question of non-payment of rent, his order cannot be questioned in a civil Court.

(FAZL ALI J.)

Brij Raj Krishna v. *Shaw & Bros*, 1951 SCR 145 : 6 DLR (SC) 185 : 1951 ALJ 5 : 1951 SCJ 238 : 30 Pat 329 : 64 LW 366 : 1951 SC 115 : BLR 1951 SC 120 : 1951 CWN 98.

BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT, 1947, **Section 4—validity.**

S. 4 is not void on the ground of contravention of Art. 14 of the Constitution. (S. R. DAS J.)

Baburam Shantaram More v. *Bombay Housing Board*, 1954 SC 153 : 1954 SCR 572 : 1954 SCJ 210 : 9 DLR SC 237.

S. 4 (1)—premises.

A local authority put up for auction certain vacant lands with the condition that the successful bidder was to erect within a specified time buildings of a certain specification at his own cost and that thereafter the local authority was to grant a lease of the plot with the buildings to him. Accordingly the building was put up and a lease was entered into with the following conditions :—The lessee was to use the buildings for certain specified purposes but not, without the lessor's consent, for purpose of trade or business. He could not pull down the buildings and was to reinstate them if they were destroyed by fire or otherwise. The lessor had the right to enter upon the premises for inspection.

The lessee thereafter sued to evict the defendant who had taken on rent one of those buildings from him. The defendant contended that the Act applied to the premises and that therefore the civil court had no jurisdiction to entertain the suit. His contention was upheld by the High Court. On appeal by the plaintiff,

Held (allowing the appeal) :

(1) By the agreement the building became the property of the local authority and it demised the land and the building which in the circumstances, in law and in fact belonged to it ;

(2) As the premises belonged to a local authority, the Act did not apply to the premises ; and

(3) The argument that the immunity by the section is available only to the local authority to which the premises belong cannot be accepted, for the only inference that can be drawn from the fact that the legislature did not in the first part of the section use phraseology similar to what it did in the second part of the section, is that the departure was made deliberately with a view to exempt the premises itself from the operation of the Act. (S. R. DAS J.)

Bhatia Co-operative Housing Society v. *D. C. Patel*, 1953 SCR 185 : 1953 SC 16 : 1952 SCJ 642 : 1953 SCA 553 : 8 DLR SC 60 : 55 Bom LR 199.

Ss. 12 & 50—Retrospective operation.

The retrospective effect of the Act is confined to what is expressly stated in S. 50. On a plain reading of the language of sections 12 & 50, it is clear that execution proceedings and appeals are excluded from the retrospective effect and are to be governed by the law in force at the time when the decrees were passed.

A suit in ejectment was decreed against the tenant and he appealed. During the pendency of the appeal, the Act came into force and it was contended by the tenant that he was entitled to the benefits of S. 12 of the Act and the appeal should be decided in accordance with the provisions of the Act.

Held (negativing the contention), section 12 is in terms prospective and not retrospective and the provisions of the Act could not be applied to the appeal.

(1949) Bom 265 (FB) Approved. (MAHAJAN J.)

Chandrasinh Manibhai v. *Surjit Lal*, 1951 SCR 221 : 1951 SC 199 : 1951 SCJ 265 : 53 Bom LR 532 : 6 DLR SC 192.

S. 12(1) —Retrospective effect.

A section may be prospective in some parts and may be retrospective in other parts. While it is the ordinary rule that substantive rights should not be held to be taken away except by express provision or clear implication many Acts though prospective in form, have been given retrospective operation if the intention of the Legislature is apparent. This is more so when Acts are passed to protect the public against some evil or abuse.

During the pendency of a suit by a landlord for possession of the demised premises, a notification was issued applying Part II of the Act (in which is contained S. 12) to the area in which the premises were situated. The tenant claimed the protection of S. 12 (1) of the Act. The plaintiff contended, relying on the decision of the Supreme Court in 1951 SCR 221 and that of the Bombay High Court in 1949 Bombay 210, that S. 12 was only prospective and did not apply to pending cases.

Held (negativing the contention),

The observations in the two decisions referred to that S. 12 was prospective were made with reference to sub-sections (2) and (3) and not with respect to sub-section (1) which did not arise for decision in those cases. The point of time when sub-section (1) would operate is when a decree for recovery of possession would have to be passed. Thus the language of the sub-section applies equally to suits pending when Part II comes into force and those to be filed subsequently and therefore the plaintiff's suit could not be decreed in contravention of the provisions of S. 12 (1) of the Act.

1951 SCR 221 and 1949 Bombay 210 Distinguished. (HIDAYATULLAH J.)

Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. *Subash Chandra Yograj Sinha,* 1961 SC 1596.

S. 13—lease of land—lessee putting up construction.

A lease of a vacant land provided that the lessee was to build thereon a building according to certain specifications and that on the expiry of the period of lease the lessee was to surrender the land and the building without any compensation. Before the expiry of the period of the lease the Act came into force. On the expiry of the lease the landlord sued for a declaration that the building belonged to him and that he was entitled to collect all the rents in respect of the same and for an account of rents received by the lessee from the sub-tenants after the expiry of the original term of the lease.

Held, while under S. 108 of the Transfer of Property Act the lessee could before the expiry of the lease remove all structures put up by him on the demised land there was nothing to pervent him from contracting to hand over the structure to the landlord without any compensation. But such contract does not transfer the ownership in the building to the lessor while the lease subsisted. As there was nothing in the contract to show that the building to be erected would be in the ownership of the lessor and that it was also to be deemed to have been leased to the tenant along with the demised land, the tenant became a statutory tenant only in respect of the land but not the building also and therefore there was no valid objection to the reliefs claimed by the lessor in the suit. (IMAM J.)

Dhairyawan v. *Thakur,* 1958 SC 789 : 1958 SCJ 1060 : 1959 SCR 799 : 61 Bom LR 548.

S. 13 (1) (e) and S. 15—Subletting with permission of the landlord.

A contract of tenancy permitted the tenant to sublet the premises and in pursuance thereof the premises were sublet. The landlord sued under S. 13 (1) (e) in ejectment on the ground of subletting which was prohibited by S. 15.

It was contended that (1) the prohibition in S. 15 applied only to other laws and there was no prohibition against a contract of subletting ; (2) the provision was for the protection of private rights of the landlord and could be waived by him ; and (3) the landlord could not enforce his rights under S. 13 (1) (e) on the principle of the maxim "*in pari delicto potior est conditio posidentis*."

Held (negativing the contentions),

(1) The prohibition in S. 15 would apply to contracts also as all contracts would fall under the provisions of the law relating to contracts.

(2) The agreement to waive an illegality was void on the ground of public policy and would be unenforceable.

(3) The maxim "*in pari delicto*....." must not be understood as meaning that where a transaction is vitiated by illegality the person left in possession of the goods after its completion in entitled to keep them. The true meaning is that where the circumstances are that the court will refuse to assist either party the consequence must, in fact, follow that the party in possession will not be disturbed. As the landlord was not seeking to enforce any agreement at all but only asking the Court to enforce the right of eviction flowing directly from the infraction of S. 15, he could be allowed relief by way of restitution or rescission, though not on the contract. (KAPUR J.)

Waman Shrinivas Kini v. *Ratilal Bhagwandas and Co.*, 1959 SCJ 635 : 1959 Sup 2 SCR 217 : 1959 SC 689 : 61 Bom LR 1011.

S. 18(1)—incomplete building.

The language of the section "in respect of the grant, renewal or continuance of a lease" envisages the existence of a lease and payment of an amount in respect of or with reference to that lease. Unless a lease comes into existence simultaneously or nearabout the time that the money is received, it cannot be said that the receipt was "in respect of" the grant of a lease. Hence where the owner of an incomplete building accepts as such a sum of money from another person in respect of an agreement between them that he was bound to give and the latter was entitled to take possession of the building as soon as it was completed on an agreed rent, such acceptance will fall outside the mischief of section 18 (1).

1953 Bom 347 (FB) Reversed. (MAHAJAN C. J.)

Tolaram v. *State of Bombay*, 1954 SC 496 : 1955 (1) SCR 158 : 1954 SCJ 547 : 1954 SCA 965 : 56 Bom LR 1206 : 55 Cr LJ 1333.

S. 24—amenity withheld before the Act.

It is not enough that the essential supply or service should have been enjoyed by the tenant at any past time however remote. It should have been "enjoyed" by the tenant at some time after the coming into effect of the Act. It will be straining the language of the section to say that "enjoyed" should mean "had the right to enjoy."

As a result of non-payment of dues, water supply had been cut off by the municipality before the Act came into force. On the landlord failing to get water connection restored after demand by the tenant in this regard, the landlord was prosecuted and convicted. The landlord appealed.

Held (allowing the appeal), (i) in so far as the landlord omitted to get the supply restored on payment of the prescribed fee, which was within his power, the landlord was continuing to withhold an essential supply within the meaning of the section, (ii) but that is not the only essential ingredient of the offence created by the section and that as the tenant had not enjoyed the amenity of supply of tap water at any time after the Act came into force one of the two essential ingredients was absent and (iii) therefore the landlord could not be convicted of an offence under S. 24. (SINHA J.)

Kanaiyalal C. Monim v. *Indumati T. Potdar*, 1958 SCR 1394 : 1958 SC 444 : 1958 SCJ 762 : 1958 Cri LJ 814 : 1958 MLJ (Cri) 576 : 1959 SCA 219 : 60 Bom LR 929.

S. 28—Jurisdiction of Civil Court.

The Civil Court has jurisdiction to decide the question whether it has jurisdiction to try a suit brought therein for possession of premises on the footing that

the Act does not apply to such premises. For, if the Act does not apply to the premises section 28 which is an integral part of the Act cannot be invoked to oust the jurisdiction of the Civil Court. (S. R. Das J.)

Bhatia Co-operative Housing Society v. *D. C. Patel*, 1953 SC 16 : 1953 SCR 185 : 1952 SCJ 642 : 1953 SCA 553 : 8 DLR SC 60 : 55 Bom LR 199.

Applicability.

A suit for a declaration that the first plaintiff was the tenant of the defendant and that another plaintiff was a lawful sub-tenant from the first plaintiff and that both were entitled to protection under the Act is a suit falling within section 28. It does not cease to be a suit between a landlord and a tenant merely because the landlord denied the claim of the plaintiffs for protection under the Act. The suit contemplated in S. 28 is not only a suit in which the relationship of landlord and tenant is admitted but also a suit in which it is claimed that the relationship of landlord and tenant within the meaning of the Act subsists between the parties. Such a suit therefore can be entertained only by a Court specified in S. 28 and no other court will have jurisdiction.

1956 Bom 656 Affirmed. (Imam J.)

Babulal Bhuramal v. *Nandram Shivram*, 1958 SC 677 : 1958 SCJ 880 : 60 Bom LR 954 : 1959 SCR 367.

Question of title.

It is possible in a suit under S. 28, that a question of title not arising out of the Act may be determined incidentally. Any party to the suit who may be aggrieved by such determination is free to sue in a competent court to establish his title by virtue of the provisions of S. 29-A. On the other hand in a suit where a question of title arises entirely out of the Act, a title which cannot be established outside the Act, the jurisdiction to try such a suit is vested exclusively in the Courts specified in the Act, and no other. But a title *de hors* the Act may be determined in any other Court of competent jurisdiction. (Imam J.)

Babulal Bhuramal v. *Nandram Shivram*, (*ibid.*).

Suit against sub-tenant.

The Plaintiff, the landlord, filed a suit in ejectment and for compensation for use and occupation against 2 persons. The first defendant was the tenant to whom the premises were let out and the second defendant was the sub-lessee from the first defendant. The ground for ejectment was that the subletting was illegal and on breach of the terms of the tenancy. It was contended by the second defendant that as the plaintiff treated him as a mere trespasser, the suit as against him could not be said to be one between a landlord and a tenant and that therefore the Small Cause Court had no jurisdiction to entertian the suit.

Held (negativing the contention), S. 28 confers jurisdiction on the court not only to try any suit between a landlord and a tenant relating to recovery of rent or possession but also to deal with any claim or question arising out of the Act or any of its provisions. That claim or question need not necessarily be one between the landlord and the tenant. Once there is a suit between a landlord and a tenant the court acquires jurisdiction also to deal with any such claim or question which may properly be raised in such a suit. As the plaintiff also contended that as a statutory tenant after the determination of the contractual tenancy the first defendant was not entitled to create a sub-tenancy, and questioned the validity of the second defendant's claim to protection under the Act, the claim or question as to the respective rights of the plaintiff and the second defendant

arises out of the Act and the language of S. 28 is wide enough to cover the same. (S. R. DAS J.)

M/s. Importers and Manufacturers Ltd. v. *Pheroze Framroze Tarapore walla*, 1953 SCR 226 : 1953 SC 73 : 1953 SCJ 82 : 1953 SCA 271 : 8 DLR SC 128 : 55 Bom LR 271.

DELHI AJMER MERWARA RENT CONTROL ACT, 1947, **S. 2 (b)—Room in a hotel.**

Conditions to be fulfilled.

See *Associated Hotels of India* v. *R. N. Kapoor*, 1960 (1) SCR 368 : 1959 SC 1262 : 1960 SCJ 453 : 1960 (2) SCA 1 : (1959) Punj 1897.

DELHI & AJMER RENT CONTROL ACT, 1952, **S. 13 (1) Proviso (g) and S. 15 (3).**

Where the tenant does not hand over possession to the landlord on or before the due date specified in the decree, if the landlord does not hand over possession to the tenant, after the rebuilding, the tenant is not entitled to be put in possession under S. 15 (3).

62 Punj LR 403 Reversed. (KAPUR J.)

Ram Nath v. *Ram Nath*, 1961 SC 104.

EAST PUNJAB URBAN RENT RESTRICTION ACT, 1949, **S. 13 (3) (a) (iii)—whether applies to pending proceedings.**

S. 13 (3) (a) (iii) as amended cannot apply to pending proceedings as it affects substantive rights of parties and cannot be characterised as procedural. (GAJENDRAGADKAR J.)

Moti Ram v. *Suraj Bhan*, 1960 SCJ 699 : 1960 SC 655 : (1960) 2 Pun 136 : 1960 (2) SCR 896.

S. 15 (4) and (5)—revision—when lies.

The finality of the appellate decision under sub-section (4) cannot be invoked before the said decision is actually recorded. Therefore in a proceeding under the Act, even though instituted before the amendment of sub-section (4) and introduction of sub-section (5), when the appellate decision has not been pronounced, the amended provision in respect of revisional jurisdiction of the High Court is applicable.

1955 (2) SCR 1117 Followed. (GAJENDRAGADKAR J.)

Moti Ram v. *Suraj Bhan*, (*ibid.*).

S. 15 (5)—extent of jurisdiction of High Court.

The revisional power conferred upon the High Court under S. 15 (5) is wider than that conferred by S. 115, Civil Procedure Code and the High Court may examine the legality or propriety of a finding of the authorities under the Act. (GAJENDRAGADKAR J.)

Moti Ram v. *Suraj Bhan*, (*ibid.*).

MADHYA BHARAT ACCOMMODATION CONTROL ACT, 1950, **S. 7—Jurisdiction of Civil Court.**

After the coming into force of the Act the jurisdiction is vested in the Rent Controller and not in the Civil Court. (KAPUR J.)

Deshraj v. *Akhtar*, 1961 SC 148.

S. 7 (2)—Notice—form.

There are no words in the section which make it obligatory that the notice should have been issued in terms as under the Act and be given after the Act came into force, nor has it prescribed any particular form.

1955 MB 21 Reversed. (KAPUR J.)

Deshraj v. *Akhtar*, (*ibid.*)

MADRAS BUILDINGS (LEASE AND RENT CONTROL) ACT, 1949, **S. 13—Validity.**

While S. 13 of the Act is constitutionally valid, any individual order of exemption passed by the Government can be the subject of judicial reveiw by the courts for finding out whether (1) it was discriminatory so as to offend Art 14 of the Constitution, (2) the order was made on grounds which are germane or relevant to the policy or purpose of the Act, and (3) it was not otherwise malafide.

It cannot be said that an order granting the exemption is an executive or administrative order which is not amenable to being quashed by a writ of *certiorari*. (RAJAGOPALA AYYANGAR J.)

P. J. Irani v. *State of Madras*, 1961 SC 1731.

MYSORE HOUSE RENT AND ACCOMMODATION CONTROL ORDER (1948), **Clauses 9 (1) and 16—non-compliance.**

The Rent Control Order of 1948 continued to be in force till it was repealed by the Mysore Rent Control Act, 1951. It was an existing law which was saved by Art. 372 of the Constitution and remained unaffected by Art. 254. Clauses 9 (1) and 16 of the Order therefore acted as a bar on the power of Court making an order of delivery of possession in execution of a decree.

The non-compliance of restrictions in clauses 9 (1) and 16 do not amount to merely an error in the exercise of jurisdiction. (KAPUR J.)

Patankar v. *Sastry*, 1961 SC 272 : 1961 (1) SCJ 221.

MYSORE HOUSE RENT AND ACCOMODATION CONTROL ACT, 1951, **S. 3 (3) (a) —Constitutional validity.**

The decision as to the suitability of a tenant is not to be controlled by the explanation to the section at all except to the extent of making certain persons unsuitable as tenants and taking it out of the discretion of the authority concerned to go into the question of their suitability. As to whether others would be suitable or not would have to be decided on the merits of each case. Full safeguard has been given to secure that an unsuitable person is not foisted on an owner as his tenant.

S. 3 (3) (a) does not therefore violate either Art. 19 (1) (f) or Article 14 of the Constitution. (SARKAR J.)

Jinadathappa v. *R. P. Sharma*, 1961 SC 1523.

U.P. (TEMPORARY) CONTROL OF RENT AND EVICTION ACT, 1946, **S. 3—permission granted by Additional District Magistrate.**

A permission granted by an Additional District Magistrate who has been appointed by the State Government with "all the powers of a District Magistrate under the Code of Criminal Procedure and under any other law for the time being in force" without special authorisation from the District Magistrate is valid.

1953 All 62 Overruled. (HIDAYATULLAH J.)

Central Talkies Ltd., Kanpur v. *Dwarka Prasad*, 1961 SC 606.

WEST BENGAL PREMISES RENT CONTROL (TEMPORARY PROVISIONS) ACT, 1950, **S. 2 (8)—Premises.**

The supply by the landlord of additional amenities like electrical installations, electric power for consumption and such other facilities does not make any difference to the application of the Act to a premises. Moreover the term "rent" has not been defined in the Act and hence must be taken to have been used in its ordinary dictionary meaning. The term 'rent' used in the Act, therefore, is comprehensive enough to include all payments agreed by the tenant to be paid to the landlord for the use and occupation not only of the building and its appurtenances but also of furnishings, electric installations and other amenities agreed to be provided by and at the cost of the landlord. The conclusion therefore is irresistible that all that is included in the term 'rent' is within the purview of the Act and the Rent Controller has the power to control the same. (SINHA J.)

Karnani Properties Ltd. v. *Miss Augustine*, 1957 SCR 20 : 1957 SC 309 : 1957 SCA 114 : 1957 SCJ 177.

S. 9 (g)—premises with additional amenities—fixation of standard rent.

Cl. (g) empowers the Rent Controller to determine the standard rent after taking into consideration all the constituents which make of the total sum shown in the agreement as monthly rent. Thus where in a tenancy agreement the landlord agrees to provide amenities like electric installation, electric power for consumption and such other facilities without any additional charge, it would be competent for the authorities, in fixing standard rent for the premises, to take into consideration the fact that electric charges, as also Government duty on the consumption of electric power and also the cost of providing for other amenities and services had become higher, besides giving credit to the amount by which municipal taxes for the premises had been increased.

1951 Cal 126 Not Approved. (SINHA J.)

Karnani Properties Ltd. v. *Miss Augustine*, (*ibid.*).

S. 18 (1)—Decree.

The word "decree" occurring in S. 18 (1) cannot cover an order for possession passed under S. 43 of the Presidency Small Cause Courts Act on an application made under S. 41 of that Act.

1951 Cal 32, 55 CWN 347, 55 CWN 421, 1952 Cal 126 and 1952 Cal 273 (F.B.) Overruled. (S. R. DAS J.)

Nalinakhya Bysack v. *Shyamsunder Haldar*, 1953 SCR 533 : 1953 SC 148 ; 1953 SCJ 261 : 1953 SCA 191.

HYDERABAD CO-OPERATIVE CREDIT SOCIETIES ACT, 1340—**F, S. 42(d)—Registrar—whether executing Court.**

The Registrar of Co-operative Societies under the Act has not been constituted an executing Court nor have any powers in the matter of execution of the award decree been conferred upon him. (MAHAJAN J.)

Co-opeartive Society of Debts v. *Nandlal*, 1950 SCR 741 : 1950 SC 274.

IMPORTS AND EXPORTS CONTROL ACT, 1947, **S. 3 (1) (a)—validity.**

The section is not *ultra vires* as amounting to delegated legislation.

1955 (1) SCR 380 Relied on. (GAJENDRAGADKAR J.)

Bhatnagars and Co. Ltd. v. *Union of India*, 1957 SCR 700 : 1957 SC 478 : 1957 SCA 810 : 1957 SCJ 546.

S. 3 (2)—Constitutionality.

The section does not offend Art. 14 of the Constitution. (SARKAR J.)

F. N. Roy v. *Collector of Customs*, 1957 SC 648 : 1957 SCA 764 : 1957 SCJ 734 : 1957 (1) MLJ 684.

INAMS—**whether** *Melvaram* **or** *Kudivaram.*

Where the Inam register extract shows that the inam was made in favour of the temple as *Devadayam* free of assessment and the Inam statement shows that the present enjoyer was the Deity and the income shown in column 13 is different from the assessment of the land as shown in the Inam register extract and no mention of the Archakas is made as the grantee or having any interest, personal or otherwise in the subject matter of the grant either in the Inam Register extract or the Inam statement,

Held, the Inam grant is in favour of the temple and comprises both *Melvaram* and *Kudivaram.*

1950 Mad 586 Affirmed. (S. R. DAS J.)

Satyanarayana v. *Konduru Venkatappayya*, 1953 SC 195 : 1953 SCR 1001 : 1953 SCJ 283 : 8 DLR SC 274 : 1953 (1) MLJ 693 : 66 LW 536.

Patelki **inams in Berar.**

It cannot be held that a member of a patel's family is entitled as of a right to a share in the emoluments of the patel's office and that the Government has no right to resume *patelki* inam lands and regrant the same to the officiator.

1954 Nagpur 20 Affirmed. (S. K. DAS J.)

Bhagwant Rao v. *Vishwas Rao*, 1960 SC 642.

Presumption.

Whether the inam comprises both *Melwaram* and *Kudivaram* that is to say, the land itself, or *melvaram* only, the entries had to be made in the Inam register in the same form and even in the case of grant of both the rights the amount of assessment had to be set out in column 7 of the Inam register. It follows, therefore, that no inference that the Inam comprised only of *Melvaram* can be made from the fact that under column 7 only the amount of assessment is set out.

1948 Mad 72 Approved. (S. R. DAS J.)

Satyanarayana v. *Konduru Venkatappayya*, 1953 SC 195 : 1953 SCR 1001 : 1953 SCJ 283 : 8 DLR SC 274 : 1953 (1) MLJ 693 : 66 LW 536.

INCOME-TAX ACT, **S. 66 (1) and (2)—Question of law—what is.**

The position emerging on the authorities is as follows :—

(1) The construction of a statute or a document of title is a pure question of law ;

(2) The legal effect of a finding of fact is a question of law ;

(3) A finding on a question of fact can be attacked under S. 66(1) as erroneous in law when there is no evidence to support it or if it is perverse ;

(4) Where the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact. (VENKATARAMA IYER J.)

Shree Meenakshi Mills Co. Ltd. v. *Commissioner of Income-tax*, 1956 SCR 691 : 1957 SC 49 : 1956 SCA 1139 : 1957 (1) MLJ 1 : 31 ITR 28 : 1957 SCJ 1 : 1957 Andh WR 1.

If the court of fact whose decision on a question of fact is final, arrives at the decision by considering material which is irrelevant to the enquiry, or by considering material which is partly relevant and partly irrelevant or bases its decision partly on conjectures, surmises and suspicions, and partly on evidence, then in such a situation clearly an issue of law arises. (MAHAJAN C. J.)

Dhirajlal v. *Commissioner of Income-tax, Bombay*, 1954 (26) ITR 736 : 1955 SC 271.

Question of law and of fact—distinction.

Decisions laying down rules to determine whether a question is one of law or of fact discussed.

Oriental Investment Co. v. *Commissioner of Income-tax, Bombay*, 1957 SC 852 : 1958 SCJ 37 : (1957) 32 ITR 664 : 1958 (1) MLJ 18 : 1958 (1) An WR 18.

INCORPORATED BODIES—**Expression of will.**

An incorporated body like a University is a legal entity. But it has neither a living mind nor voice. It can only express its will in a formal way by a formal resolution and act in its corporate capacity by resolutions properly considered, carried and duly recorded in the manner laid down by its constitution. Hence an omission to give notice even to a single member in particular circumstances would invalidate a meeting and the resolutions passed thereat. But the position is different when either by custom or by the nature of the body or by its constitution and rules greater latitude and flexibility are permissible. Each case must be governed by its own facts and no universal rule can be laid down. Also it may well be that in the same body certain routine matters can be disposed of with less formality than others. (BOSE J.)

Vice Chancellor, Utkal University v. *S. K. Ghosh*, 1954 SC 217 : 1954 SCR 883 : 1954 SCJ 252 : 1954 SCA 311 : 9 DLR SC 231 : (1954) Orissa 288.

INDIAN INDEPENDENCE (LEGAL PROCEEDINGS) ORDER, 1947, **Ss. 4 (1), (2) and (3)—construction.**

The pending proceedings to which Cl. (1) applies would continue before the specified courts even though the jurisdiction of the said courts may otherwise have been affected by the passing of the Indian Independence Act, 1947, or the transfer of certain territories, that the appeals would be taken against the judgments or orders passed in the said proceedings in the same manner in which they would have

been allowed if the original proceedings had been instituted after 15-8-47 and that the final judgment, decree or order or sentence in the said proceedings would be executed in either Dominion as if the said proceedings had terminated in that manner in a competent court in the Dominion where execution is sought.

The scope and extent of the proceedings covered by Cl. (1) is limited only to such cases where jurisdiction of the specified court was affected by the passing of the Act or the transfer of certain territories.

1957 Punjab 201 Disapproved. (GAJENDRAGADKAR J.)

Associated Hotels of India v. *Jodha Mal*, 1961 SC 156.

INDIAN INDEPENDENCE (RIGHTS, PROPERTY AND LIABILITIES) ORDER, 1947, **Art 8(1).**

The Article clearly contemplates both classes of contracts where the consideration is either executed or executory.

1952 Cal 140 Not Approved. (S. K. DAS J.)

Union of India v. *M/s. Chamanlal Loona and Co.*, 1957 SC 652 : 1957 SCJ 719 : 1957 SCA 825.

INSURANCE ACT, 1938

Ss. 2D and 7—"not otherwise provided for."

The words "not otherwise provided for" refer to liabilities in the nature of claims against the insurer whether he admits them or not and whether a decree in respect of them has been finally passed or not.

S. 2D contemplates satisfactory "provision otherwise" over and above the deposit made under S. 7. (WANCHOO J.)

Vanguard Fire and General Insurance Co. v. *M/s. Fraser and Ross*, 1960 SC 971 : (1960) 30 Com Cas 13 : 1960 (2) SCA 563.

Ss. 2D and 33—legality of order.

It is proper that when an order is being passed under S. 33 read with S. 2D, it should show on the face of it that the Government was *prima facie* satisfied that the liabilities remained unsatisfied or otherwise provided for. But the fact that the order does not show on the face of it that the Government had considered this aspect of the matter will not make it bad, if it is shown that there were materials before the Government justifying a *prima facie* conclusion. (WANCHOO J.)

Vanguard Fire and General Insurance Co. v. *M/s. Fraser and Ross*, (*ibid.*).

S. 33—Insurer.

The word 'insurer' as used in S. 33 refers not only to a person who is actually carrying on business but also refers to insurers who were carrying on business of insurance but have closed it.

1959 Mad 336 Affirmed. (WANCHOO J.)

Vanguard Fire and General Insurance Co. v. *M/s. Fraser and Ross*, (*ibid.*).

S. 52-A (1)—insurer carrying on general insurance.

Where an insurer is carrying on insurance business of various kinds which

includes life insurance business, he becomes amenable to the provisions of S. 52-A, if he is acting in a manner prejudicial to the interests of the holders of life policies.

The words "the affairs" and "the business" of the insurer are wide enough to empower the Government to take over the management of the entire business of the insurer including his general insurance business after considering the report of the Controller, in such a case. (IMAM J.)

Tropical Insurance Company v. *Union of India*, 1955 (2) SCR 517 : 1955 SC 789 : 1956 SCJ 11 : 1956 SCA 131 : 25 Com Cas 91 : 1956 (1) MLJ 9.

INTEREST ACT, 1939, **Sec. 1—Applicability.**

The following among other conditions must be fulfilled before interest can be awarded under the Act :—

(1) there must be a debt or a sum certain ;
(2) it must be payable at a certain time or otherwise ;
(3) these debts or sums must be payable by virtue of some written contract at a certain time ;
(4) there must have been a demand in writing stating that interest will be demanded from the date of the demand. (BOSE J.)

Tharwardas v. *Union of India*, 1955 (2) SCR 48 : 1955 SC 468 : 1955 SCA 862 : 1955 SCJ 445 : 1955 (2) MLJ 23 : 57 Pun LR 369 : 34 Pat 359 : 1955 MWN 782.

Notice not specifying sum claimed.

Where the notice which is given does not specify the sum which is demanded, the Act will not apply. (HIDAYATULLAH J.)

Mahabir Prasad Rungta v. *Durga Datta*, 1961 SC 990 : 1961 (1) SCA 142 : 1961 (1) SCJ 569.

S. 1, Proviso—awarding interest in equity.

The power to award interest on equitable grounds or under any other provisions of the law is expressly saved by the proviso to section 1.

65 Ind App 66 Relied on.

Held, the right to receive interest in lieu of possession of immoveable property taken away by compulsory acquisition (under the East Punjab Requisition of Immoveable Property (Temporary Powers) Act, 1948) which is an equitable right was saved by the proviso. (GAJENDRAGADKAR J.)

Satinder Singh v. *Umrao Singh*, 1961 SC 908.

INTERNATIONAL LAW—**Private—Debt arising in a foreign country.**

The determination of legal liabilities arising out of a debt incurred in a foreign country raises complicated questions of private international law and two distinct lines of thought emerge : One is that applied by the English Courts, namely, the *lex situs ;* the other is the one favoured by Cheshire in his book on Private International Law, namely, the proper law of the contract, i.e., the law of the country in which its elements are most densely grouped and with which factually the contract is most closely connected, that law, again, being administered as "a living and changing body of law" and effect being given to any changes occurring in it before performance falls due and not as it obtained when the contract was made and the obligation fashioned.

Though it is true that in all the English cases, the judges purported to apply

the *lex situs*, in determining the *situs* they applied rules which in fact are the very rules which in practice would be used in determining the proper law of the contract.

English Law discussed.

The defendant, an Indian Company, owed to the plaintiff a debt arising out of transactions which took place before 15-8-1947 in Lyallpur which on partition was assigned to Pakistan. The plaintiff fled to India and became an evacuee. Under an Ordinance the Pakistan Government froze all evacuee assets and compelled the defendant to pay the debt to the custodian of evacuee property. Under the Ordinance that payment operated as a discharge of the obligation. Subsequently the plaintiff sued the defendant in India for recovery of the debt.

Held, it is probably true to say that a debt is properly garnishable in the country where according to the ordinary usage of business it would be normally regarded as payable and therefore whether the proper law of the contract applies or the English Law of *situs* in such a case applies, the defendant was exonerated from liability under the Pakistan Ordinance which cannot be condemned as confiscatory or opposed to public policy because in India there are similar laws.

1955 Punjab 129 Reversed. (BOSE J.)

Delhi Cloth and General Mills Company Ltd. v. *Harnam Singh*, 1955 (2) SCR 402 : 1955 SC 590 : 1955 SCJ 645 : 57 Pun LR 313 : 1955 (2) MLJ 141 : (1955) Pun 1127.

Proper Law of the contract.

A debt is property and is a chose-in-action. Under modern conditions, choses-in-action arising out of contract have two aspects : (1) as property and (2) as involving a contractual obligation for performance. The property aspect is relevant for purposes of assignment, administration, taxation and the like ; the contactual aspect for performance. (BOSE J.)

Delhi Cloth and Gen. Mills Co. v. *Haram Singh*, (*ibid.*).

Domicile.

Two constituent elements that are necessary for the existence of domicile are : (1) a residence of a particular kind and (2) an intention of a particular kind. There must be the factum and there must be the animus. The residence need not be continuous but it must be indefinite, not purely fleeting. The intention must be a present intention to reside for ever in the country where the residence has been taken up. (MAHAJAN C.J.)

Central Bank of India v. *Ram Narain*, 1955 SCR 697 : 1955 SC 36 : 1954 SCA 1305 : 1955 SCJ 4 : 1954 MWN 999 : 1955 Cr LJ 152 : 1955 All WR 12 : 57 Pun LR 153.

INTERPRETATION OF STATUTES

SUMMARY

1. GENERAL PRINCIPLES.
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16. PARTICULAR ENACTMENTS.

1. GENERAL PRINCIPLES

Acts not *in pari materia*.

It is not safe to pronounce on the provisions of one Act with reference to decisions dealing with other Acts which may not be *in pari materia*. (SINHA J.)

Hari Khemu Gawali v. *Deputy Commissioner of Police, Bombay*, 1956 SCR 506 : 1956 SC 559 : 1956 SCJ 599 : 1956 SCA 1046 : 58 Bom LR 995.

Admission of a party.

When the facts are fully set out and admitted, a party's opinion about the legal effect of those facts is of no consequence in construing a legislative provision.

The owner of an establishment, who was prosecuted under the Bombay Shops and Establishments Act, 1948, had described his establishment as a workshop and his business as a factory.

Held, although this might have raised an inference of fact against him had nothing else been known, when the facts are admitted, his opinion about the legal effect of the facts is of no consequence in construing the Act and determining whether the premises was a "shop." No estoppel arises in such a case.

(BOSE J.)

Kalidas v. *State of Bombay*, 1955 SCR 887 : 1955 SC 62 : 1955 SCJ 150 : 1955 SCA 340 : 1955 Cr LJ 193.

Conflicting provisions.

Whenever it is possible to do so, the court should construe the provisions which appear to conflict so that they harmonise. (S. R. DAS J.)

Raj Krishna Bose v. *Binod Kanungo*, 1954 SC 202 : 1954 SCR 913 : 1954 SCJ 286 : 1954 SCA 737 : 9 DLR SC 218 : 1954 (1) MLJ 489 : 1954 MBLJ SC 11.

Constitutional enactment.

It is clear that in construing an entry in a list conferring legislative powers the widest possible construction according to their ordinary meaning must be put upon the words used therein. (S. R. DAS J.)

Navinchandra v. *Commissioner of Income-tax, Bombay*, 1955 SCR 829 : 1955 SC 58 : 1955 SCA 685 : 1955 SCJ 158 : 1954 (26) ITR 758 : 57 Bom LR 628 : 1955 Andh WR 87 : 1955 (1) MLJ 87.

Constitutional question.

In dealing with constitutional questions, Courts should be slow to embark upon an unnecessarily wide or general enquiry and should confine their decision

as far as may be reasonably practicable within the narrow limits of the controversy arising between the parties in the particular case.

In interpreting the provisions of the Constitution the Court must always bear in mind that the relevant provision has to be read not *in vacuo* but as occurring in a single complex instrument in which one part may throw light on another.

1936 AC 578 Relied on. (GAJENDRAGADKAR J.)

Atiabari Tea Co. Ltd. v. *State of Assam*, 1961 SC 232.

Liability of State.

The rule of interpretation of statutes that the State is not bound by a statute, laid down by the Judicial Committee in 73 Ind. App. 271 is good law even after the coming into effect of the Constitution of India.

1950 Cal 417 Approved ; 25 Mad 457 Overruled ; 1955 Cal 282 Reversed. (SINHA C. J.)

Director of Rationing and Distribution v. *The Corporation of Calcutta*, 1960 SC 1355 : 1960 Cr LJ 1684.

(**Note** :—In this case the accused, an officer of the Government was prosecuted under the Calcutta Municipal Act. A preliminary objection that the prosecution was not maintainable in law, as the State was not bound by a statute was upheld and the accused acquitted. The High Court, in revision, set aside the acquittal and directed trial on merits. On appeal to the Supreme Court, it was *held* that the preliminary objection must be upheld and the Government could not be prosecuted.)

Nature of an enactment.

The true nature of a law has to be determined not on the label given to it in the Statute but on its substance. (VENKATARAMA IYER J.)

Sundararamier and Co. v. *State of Andhra Pradesh*, 1958 SCR 1422 : 1958 SC 468 : 1958 SCA 492 : 1958 SCJ 459 : 1958 (9) STC 298 : 1958 (1) An WR 179 : 1958 (1) MLJ 179.

Recourse to English Law.

Where the terms of a statute are plain and unambiguous, resort cannot be had to the position of law obtaining in England and it is the clear duty of the courts to construe the plain terms of the statute and give them their legal effect. Such recourse to English Law will be permissible only, if there is any latent or patent ambiguity and the courts are required to find out what was the true intendment of the Legislature. (BHAGWATI J.)

Sales Tax Officer v. *Kanhaiya Lal*, 1959 SCR 1350 : 1959 SC 135 : 1959 (1) MLJ 35 : (1959) 1 All 32 : 1959 (1) An WR 35 : 1959 SCJ 53.

Statutory rules.

The rules made under a statute cannot enlarge the meaning of a section. If a rule goes beyond what the section contemplates, the rule must yield to the statute. (S. K. DAS J.)

Central Bank of India v. *Their Workmen*, 1960 (1) SCR 200 : 1960 SC 12 : 1960 SCJ 842 : 1960 (1) SCA 454 : 17 FJR 57 : 29 Comp Cas 367.

Surplusage.

It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute.

(PATANJALI SASTRI C. J.)

Aswini Kumar Ghosh v. *Arabinda Bose*, 1952 SC 369 : 1952 SCJ 568 : 1953 SCR 1 : 1952 SCA 683 : 8 DLR SC 92.

2. GENERAL RULES OF CONSTRUCTION

Principles to be noted.

It is a sound rule of construction of a statute firmly established in England that, for the true interpretation of all statutes in general, four things are to be discerned and considered :

(1) what was the common law before the making of the Act ;
(2) what was the mischief and defect for which the common law did not provide ;
(3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth ; and
(4) the true reason of the remedy.

The office of the Judge is to make such construction as shall suppress the mischief, and advance the remedy and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo* and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *Pro bono publico*.

This rule is equally applicable to the construction of the Indian Constitution. (S. R. DAS AG. C. J.)

Bengal Immunity Co. Ltd. v. *State of Bihar*, 1955 (2) SCR 603 : 1955 SC 661 : 1955 SCA 1140 : 1955 SCJ 672 : 34 Pat 905 : 1955 (2) SCR 168 : 1955 (6) STC 446.

The following rules of construction are well established :—

(1) Statutes which encroach on the rights of a subject should be intepreted if possible so as to respect such rights.

(2) In the absence of clear and unambiguous language, an intention to alter the existing law should not be imputed to the legislature.

(3) The law does not favour a repeal of a statute by implication, and therefore a later statute should not be construed as repealing an earlier one without express words, or by necessary implication.

Ravulu Subba Rao v. *Commissioner of Income-tax*, 1956 SCR 577 : 1956 SC 604 : 1956 SCA 1025 : 1956 SCJ 591 : (1956) 30 ITR 163 : 1956 (2) MLJ 43.

Duty of Courts.

When the meaning of an Act can be fairly gathered from the words used, it is the duty of the Courts to give effect to that meaning. (BOSE J.)

Sham Rao v. *District Magistrate, Thana*, 1952 SC 324 : 1952 SCR 683 : 1952 SCJ 476 : 1952 SCA 635 : 7 DLR SC 380 : BLR 1952 SC 358 : 54 Bom LR 877 : 53 Cr LJ 1503.

It is no doubt the duty of the Court to try and harmonise the various provisions of an Act passed by the Legislature but certainly not to stretch the words used by the Legislature to fill in gaps or omissions in the provisions of an Act.

(BHAGWATI J.)

Hira Devi v. *District Board, Shahjahanpur*, 1952 SC 362 : 1952 SCR 1122 : 1952 SCJ 33 : 1952 ALJ 717 : 1953 SCA 6 : (1953) 1 All 642.

Grammatical construction.

It is a rule of interpretation well established that, where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence.

Maxwell's Interpretation of Statutes, 10th Edn. P. 229 Ref. to.
(VENKATARAMA IYER J.)

Tirath Singh v. *Bachittar Singh*, 1955 (2) SCR 457 : 1955 SC 830 : 1955 SCA 424 : 1955 SCJ 787 : 1955 (2) MLJ 292 : 1956 Nag LJ 53 : 1956 MWN 155 : 1955 Patiala 466 : 1956 SCC 77.

The cardinal (Golden) rule of construction of statutes is to read the statutes literally, that is by giving to the words used by the legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptibile of another meaning, the court may adopt the same. But if no such alternative construction is possible, the court must adopt the ordinary rule of literal interpretation. (S. R. DAS J.)

Jugalkishore v. *Raw Cotton Co. Ltd.*, 1955 SCR 1369 : 1955 SC 376 : 1955 SCA 440 : 1955 SCJ 371 : 1955 (1) MLJ 220 : 58 Bom LR 517 : 1955 MWN 421.

Hardship or inconvenience.

Hardship or inconvenience cannot alter the clear meaning of the language employed by the Legislature. (S. R. DAS J.)

Commissioner of Agricultural Income-tax, West Bengal v. *Kesab Chandra*, 1950 SCR 435 : 1950 SC 265 : 1950 SCJ 364 : 1950 ITR 569 : 5 DLR SC 98.

Liberal construction—when to be applied.

Where the literal meaning of the words used in a statutory provision would manifestly defeat its object by making a part of it meaningless and ineffective, it is legitimate and even necessary to adopt the rule of liberal construction so as to give meaning to all parts of the provision and to make the whole of it effective and operative. (GAJENDRAGADKAR J.)

Siraj-ul-Haq v. *Sunni Central Board of Waqfs, U.P.*, 1959 SCR 1287 : 1959 SC 198 : 1959 SCJ 367 : 1959 ALJ 83 : (1959) 1 All 8.

Strict construction.

It is no doubt true that if on its true construction a statute leads to anomalous results the courts have no option but to give effect to it and leave it to the legislature to amend and alter the law. But when on a construction of a statute two views are possible, one which results in an anomaly and the other not, it is the duty of the Court to adopt the latter and not the former, seeking consolation in the thought that the law bristles with anomalies. (VENKATARAMA IYER J.)

Veluswamy Thevar v. *Raja Nainar*, 1959 SC 422 : 1959 Supplement (1) SCR 623 : 17 Elec LR 181.

3. RETROSPECTIVE OPERATION

Statutes creating or taking away substantive rights are ordinarily prospective unless by express words or necessary implication the Legislature makes them otherwise. The retrospective operation will be limited only to the extent to which it has been so made by express words or necessary implication. The intention of the Legislature has to be gathered from the words used giving them their plain, normal, grammatical meaning. If in any legislation the general object of which is to benefit certain class of persons, any provision is ambiguous so that it is capable of two meanings, one which would preserve the benefit should be adopted rather than the one which would take it away. If the strict grammatical interpretation gives rise to an absurdity or inconsistency, it should be discarded and an interpretation which will give effect to the purpose which the Legislature may reasonably be considered to have had, should be adopted, if necessary, even by modification of the language used. (DAS GUPTA J.)

Mahadeolal Kanodia v. *Administrator General, W. Bengal*, 1960 (3) SCR 578 : 1960 SC 936 : 1961 (1) SCJ 15.

The rule that a statute is not to have retrospective operation is only applicable when it is doubtful from the language used whether or not it was intended to have such operation. Where the language plainly gives it retrospective operation, the rule has no application, for it is competent for the Legislature to make the provisions of an Act retrospective. (SARKAR J.)

Gulab Chand v. *Kudilal*, 1958 SC 554 : 1959 SCJ 173 : 1958 MPLJ 632 : 1958 MPC 641 : 1958 Jab LJ 485 : 1959 SCR 313.

Declaratory Acts and Remedial Acts.

Declaratory Acts to remove doubts as to existing common law, or the meaning, or effect of a statute, or to set aside what the legislature deems to have been a judicial error are usually held to be retrospective. A remedial Act, which either enlarges or restrains, takes effect prospectively, unless it has retrospective effect by express terms or by necessary intendment. (S. K. DAS J.)

Central Bank of India v. *Their Workmen*, 1960 (1) SCR 200 : 1960 SC 12 : 1960 SCJ 842 : 1960 (1) SCA 454 : 17 FJR 57 : 29 Com Cas 367.

Procedural Law.

A change in the law of procedure operates retrospectively and applies to pending proceedings, unlike the law relating to vested rights. (KAPUR J.)

Anant Gopal Sheorey v. *State of Bombay*, 1958 SC 915 : 1959 SCR 919 : 1958 SCJ 1231 : 1958 Cri LJ 1429 : (1959) 2 MLJ 207 : (1959) 2 An WR 207 : 1958 MLJ (Cri) 956 : 1958 All WR 842 : 1958 All Cri R 561.

Right of appeal.

An impairment of a right of appeal by putting a new restriction, or imposing a more onerous condition (e.g., increase in the court fee payable on a memorandum of appeal) is not a matter of procedure only ; it imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly, or by necessary intendment.

1953 SCR 987 and 1957 SCR 488 Followed. (S. K. DAS J.)

State of Bombay v. *Supreme General Films Exchange*, 1960 (3) SCR 640 :.

1960 SC 980 : 1961 (1) SCJ 119 : 1961 (1) MLJ 12 : 1961 An WR 12 : 1960 Nag LJ 768 : 62 Bom LR 910 : 1960 Ker LT 17.

4. INTENTION OF THE LEGISLATURE

The primary duty of a Court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find the intention. (MAHAJAN J.)

New Piece-goods Bazar v. *Commissioner of Income-tax* 1950 SCR 553 : 1950 SCJ 437 : 5 DLR SC 89 : 1950 ITR 516 : 63 LW 870 : 1950 (2) MLJ 559 : 52 Bom LR 764 : 86 CLJ 131 : 1950 SC 165.

Unless there is ambiguity, it will not be open to the Court to depart from the normal rule of construction, which is that the intention of the legislature should be primarily gathered from the words which are used. It is only when the words used are ambiguous that they would stand to be examined and construed in the light of surrounding circumstances and constitutional principle and practice. (BHAGWATI J.)

Commissioner of Income-tax, M.P. and Bhopal v. *Smt. Sodra Devi*, 1957 SC 832 : 1958 SCJ 1 : 32 ITR 615 : 1958 (1) MLJ 1 : 1958 (1) An WR 1.

The first and primary rule of construction of the provisions of any statute is that the intention of the legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only, then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provision of the Act must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions, that the question of giving effect to the policy or object of the Act can legitimately arise. When the material words are capable of two constructions one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the Courts would prefer to adopt the latter construction. It is only in such cases that it becomes relevant to consider the mischief and defect which the Act purports to remedy and correct. (GAJENDRAGADKAR J.)

Kanai Lal v. *Paramanidhi Sadhukhan*, 1957 SC 907 : 1958 SCJ 99 : 1957 SCA 1033.

Where there is great obscurity in the language employed in the relevant provision, and the Legislature acquiesces in the construction placed upon it by the Courts for a number of years, it will be legitimate to infer that the view expressed by by the Court is in accord with the intention of the Legislature.
(CHANDRASEKHARA IYER J.)

Ram Nandan v. *Kapildeo*, 1951 SC 155 : 1951 SCR 138 : 1951 SCJ 149 : 1952 SCA 13 : 53 Bom LR 472 : 6 DLR SC 122 : 1951 (1) MLJ 314 : BLR 1951 SC 150.

The language used by the Legislature is the true repository of the legislative intent. The words and phrases occurring in a statute are to be taken not in an isolated or detached manner dissociated from the context but are to be read together and construed in the light of the purpose and object of the Act itself.
(MUKHERJEA J.)

Darshan Singh Balwant Singh v. *State of Punjab*, 1953 SC 83 : 1953 SCJ 48 :

1953 SCR 319 : 1953 SCA 856 : 8 DLR SC 169 : 1953 (1) MLJ 220 : 54 Cr LJ 525 : 19 CLT 419.

When a question arises as to the interpretation to be put on an enactment, the Court has to ascertain the intent of "them, that make it," which must be gathered from the words actually used in the statute. That however, does not mean that the words should be literally interpreted in disregard of all other materials. Therefore, regard must be had to all such factors as can legitimately be taken into account in ascertaining the intention of the legislature, such as the history of the legislation and the purposes thereof, the mischief which it intended to suppress and the other provisions of the statute and construe the language in the light of the indications furnished by them.

1955 (2) SCR 603 Referred to. (VENKATARAMA IYER J.)

R.M.D. Chamarbaugwalla v. *Union of India*, 1957 SC 628 : 1957 SCA 912 : 1957 SCJ 593 : 59 Bom LR 973 : (1957) 2 MLJ 76 : 1957 MLJ (Cr) 547 : 1957 (2) An WR 76 : 1957 MPC 630.

If the language of the enactment is clear and unambiguous, it will not be legitimate for the court to add any words thereto for effectuating a supposed intention of the Legislature. (BHAGWATI J.)

Sri Ram Narain v. *State of Bombay*, 1959 SC 459 : 1959 SCA 491 : 1959 Sup 1 SCR 489 : 1959 SCJ 679 : 61 Bom LR 811 : 1959 (2) An WR 1 : 1959 (2) MLJ 1.

5. OBJECT OF THE ENACTMENT

It is a settled rule of construction that to ascertain the legislative intent, all the constituent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose and object of the statute itself. (MUKHERJEA J.)

Poppatlal Shah v. *State of Madras*, 1953 SC 274 : 1953 SCR 677 : 1953 SCJ 369 : 8 DLR SC 513 : 1953 (1) MLJ 739 : 66 LW 573 : 54 Cr LJ 1105 : 1953 STC 188 : 1953 SCA 466.

It is well settled that the words of a statute, when there is a doubt about their meaning, are to be understood in the sense, in which they best harmonise with the object which the legislature has in view. Their meaning is found, not so much in strictly grammatical, or etymological propriety of language nor even in their popular use as in the subject or in the occasion on which they are used and the object to be attained.

Maxwell "Interpretation of Statutes" 5th Edn. p. 55 Ref. to. (KAPUR J.)

Workmen of Dimakuchi Tea Estate v. *Management of D.T. Estate*, 1958 SCR 1156 : 1958 SC 353 : 1958 SCA 602 : 1958 SCJ 637 : 14 FJR 41 : 1958 (1) Lab LJ 500.

A construction which leads to a result that the legislature has failed to achieve its object in enacting the statute must, if that is possible, be avoided. (VENKATARAMA IYER J.)

Commissioner of Income-tax, Delhi v. *S. Teja Singh*, 1959 SC 352 : 1959 SCJ 425 : 1959 Sup 1 SCR 394 : (1959) Punj 573 : 1959 (1) MLJ 154 : 35 ITR 408.

The words of a statute when there is doubt about their meaning are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the legislature has in view. Their meaning is found not

so much in a strictly grammatical or etymological propriety of language nor even in their popular use, as in the subject or in the occasion on which they are used and the object to be obtained. In order to come to a decision as to the true meaning of a word used in a statute one has to enquire as to the subject matter of the enactment and the object which the legislature had in view. (S. R. DAS C. J.)

State of Uttar Pradesh v. *C. Tobit*, 1958 SC 414.

6. PROCEEDINGS OF THE LEGISLATURE

A speech made in the course of the debate on a Bill could at best be indicative of the subjective intent of the speaker but it could not reflect the inarticulate mental processes lying behind the majority vote which carried the Bill ; nor is it reasonable to assume that the minds of all those legislators were in accord. The Court could only search for the objective intent of the legislature primarily in the words used in the enactment aided by such historical material as reports of statutory Committees, preambles etc. (PATANJALI SASTRI J.)

A. K. Gopalan v. *State of Madras*, 1950 SCR 88 : 1950 SCJ 174 : 1950 SC 27 : 1950 MWN 495 : 1950 (2) MLJ 42 : 43 LW 638 : 51 Cr LJ 1383.

While it is not proper to take into consideration opinions of individual members to construe the meaning of a particular clause, when a question is raised whether a certain phrase, or expression was up for consideration at all, a reference to the debates may be permitted. (KANIA C. J.)

A. K. Gopalan v. *State of Madras*, (*ibid.*).

Legislative proceedings cannot be referred to for the purpose of construing an Act or any of its provisions, but they are relevant for the proper understanding of the circumstances under which it was passed and the reasons which necessitated it. (FAZL ALI J.)

Charanjitlal v. *Union of India*, 1951 SC 41 : 64 LW 47 : 1950 SCR 869 : 1951 SCJ 29 : 6 DLR SC 432 : 1951 MWN 111 : 1951 Comp Cas 33 : BLR 1951 SC 40 : 1951 CWN 235.

Speeches made by members of the Legislature during debates cannot be made use of in interpreting statutes. This rule, accepted in England, has been observed in interpreting Indian Statutes (22 Ind. Appeals 107 referred to). This rule is adopted in Canada and Australia also. (Craies on Statute Law, 5th Edn. p. 122.) In America, however, a distinction is sometimes made in using such material to ascertain the purpose of a statute and using it for ascertaining its meaning.

1952 T.C. 83 Disapproved. (PATANJALI SASTRI C. J.)

State of Travancore-Cochin v. *Bombay Company Ltd.*, 1952 SC 366 : 1952 SCR 1122 : 1952 SCJ 527 : 1953 (1) MLJ 1 : 65 LW 1087 : 1952 SCA 656 : 1 BLJ 94 : 1952 STC 434 : 1952 KLT 581.

Speeches made in the course of the debate by members of the legislature are not admissible as extrinsic aids to the interpretation of statutory provisions. (PATANJALI SASTRI C. J.)

Aswini Kumar Ghose v. *Arabinda Bose*, 1952 SC 369 : 1952 SCJ 568 : 1952 SCA 683 : 8 DLR SC 92 : 1953 SCR 1.

Amendments to Bills.

The proposition that acceptance or rejection of amendments to a Bill in the course of Parliamentary Proceedings forms part of the pre-enactment history of

a statute and as such might throw valuable light on the intention of the Legislature, when the language used in the statute admits of more than one construction cannot be accepted, for the reason why a particular amendment was proposed or accepted or rejected is often a matter of controversy, and without the speeches bearing upon the motion cannot be ascertained with any reasonable degree of certainty, and where the Legislature happens to be bicameral, the second chamber may or may not have known of such reason when it dealt with the measure.
(PATANJALI SASTRI C. J.)

Aswini Kumar Ghose v. *Arabinda Bose*, (*ibid.*).

7. STATEMENT OF OBJECTS AND REASONS

The Statement of Objects and Reasons appended to a Bill should be ruled out as an aid to the construction of a statute. (PATANJALI SASTRI C. J.)

Aswini Kumar Ghose v. *Arabinda Bose*, 1952 SC 369 : 1952 SCJ 568 : 1952 SCA 683 : 8 DLR SC 92 : 1953 SCR 1.

The Statement of Objects and Reasons is not admissible to construe the true meaning of an enactment. (VENKATARAMA IYER J.)

R. M. D. Chamarbaugwalla v. *Union of India*, 1957 SC 628 : 1957 SCA 912 : 1957 SCR 593 : 59 Bom LR 973 : 1957 (2) MLJ 76 : 1957 (2) An WR 76 : 1957 MPC 630.

The Statement of Objects and Reasons cannot be used for construing the section, far less can it control the actual words used. (S. K. DAS J.)

Central Bank of India v. *Their Workmen*, 1960 (1) SCR 200 : 1960 SC 12 : 1960 SCJ 842 : 1960 (1) SCA 454 : 17 FJR 57 : 29 Comp Cas 367.

The Statement of Objects and Reasons may be referred to for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same, and the extent and urgency of the evil, which he sought to remedy. (per S. R. DAS J. contra.)

State of W. Bengal v. *Subodh Gopal*, 1954 SC 92 : 1954 SCR 587 : 1954 SCJ 127 : 1954 SCA 65 : 9 DLR SC 127 : 67 LW 206.

The Statement of Objects and Reasons is not admissible as an aid to the construction of a statute. But it can be referred to for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy.

1954 SCR 587 Relied on. (BHAGWATI J.)

M. K. Ranganathan v. *Government of Madras*, 1955 SC 604 : 1955 SCJ 515 : 1955 SCA 841 : (1955) 25 Comp Cas 344 : 1955 MWN 805 : 1955 (2) MLJ 68.

It has been said that although the Statement of the Objects and Reasons appended to a Bill is not admissible as an aid to the construction of the Act as passed, yet it may be referred to only, for the limited purpose of ascertaining the conditions prevailing at the time which necessitated the making of the law.
(BHAGWATI J.)

T. K. Musaliar v. *Venkatachalam Potti*, 1955 (2) SCR 1196 : 1956 SC 246 : 1956 SCA 259.

The Statement of Objects and Reasons is not admissible as an aid to the construction of a statute but may be referred to for ascertaining the conditions

prevailing at the time the Bill was introduced and the purpose for which the law is enacted. (SUBBA RAO J.)

Kochunni v. *States of Madras and Kerala*, 1960 SC 1080 : 1960 Ker LT SC 31 : 1960 Ker LJ 1077.

8. PREAMBLE, TITLE AND MARGINAL NOTES

The preamble of a statute has been said to be a good means of finding out its meaning and, as it were, a key to the understanding of it. (BHAGWATI J.)

T. K. Musaliar v. *Venkatachalam Potti*, 1955 (2) SCR 1196 : 1956 SC 246 : 1956 SCA 259.

The preamble of a statute is a key to its understanding and may legitimately be consulted to resolve an ambiguity, or to fix the meaning of words, which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt. (SUBBA RAO J.)

Kochunni v. *States of Madras and Kerala*, 1960 SC 1080 : 1960 Ker LT (SC) 31 : 1960 Ker LJ 1077.

The title and preamble, whatever may be their value as aids to the construction of a statute, undoubtedly throw light on the intent and design of the Legislature and indicate the scope and purpose of the legislation itself. (MUKHERJEA J.)

Poppatlal Shah v. *State of Madras*, 1953 SC 274 : 1953 SCR 677 : 1953 SCJ 369 : 1953 SCA 466 : 8 DLR SC 513 : 1953 (1) MLJ 739 : 66 LW 573 : 54 Cr LJ 1105 : 1953 STC 188.

Marginal notes in a statute cannot be referred to for the purpose of construing the statute ; nor can the title of a chapter be legitimately used to restrict the plain terms of an enactment. (PATANJALI SASTRI J.)

Commissioner of Income-tax v. *Ahmedbai Umarbai*, 1950 SCR 335 : 1950 SC 134 : 1950 SCJ 374 : 5 DLR SC 56 : 1950 ITR 472 : 52 Bom LR 719.

Apart from the question whether the marginal note can at all be referred to in construing the provisions of a section of an Act, it is quite clear on the authorities that the marginal note cannot control the meaning of the body of the section, if the language used therein is clear and unambiguous. If the language of the section is clear then it may be that there is an accidental slip in the marginal note rather than that the marginal note is correct and the accidental slip is in the body of the section itself. We have therefore to read the words used in the body of the section and if we find the meaning clear and unambiguous, the marginal note should not be permitted to create an ambiguity in the section. (S. R. DAS J.)

Nalinakhya Bysack v. *Shyamsunder Halder*, 1953 SC 148 : 1953 SCR 533 : 1953 SCJ 201 : 1953 SCA 191.

It may be that the description of a legislative provision cannot be decisive of its true meaning or interpretation which must depend upon the words used therein, but, when two interpretations are sought to be put upon a provision that which fits the description which the Legislature has chosen to apply to it, is, according to sound canons of construction, to be adopted, provided of course, it is consistent with the language employed, in preference to the one which attributes to the provision a different effect from what it should have according to its description by the Legislature. (PATANJALI SASTRI C. J.)

State of Bombay v. *United Motors Ltd.*, 1953 SC 252 : 1953 SCR 1069 ;

1953 SCJ 373 : 1953 SCA 408 : 8 DLR SC 294 : 55 Bom LR 536 : 1953 (1) MLJ 743 : 66 LW 577 : 1953 STC 133.

Marginal notes in Constitution.

The marginal note to an article in the Constitution which, unlike the marginal notes in Acts of Parliament, is part of the Constitution, *prima facie* furnishes some clue as to the meaning and purpose of the Article.

Bengal Immunity Co. Ltd. v. *State of Bihar*, 1955 (2) SCR 603 : 1955 SC 661.

9. DEFINITIONS

When the definition clause begins with the qualifying words, "Unless there is anything repugnant in the subject or context", even though a definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections. The Court has also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words, "under the circumstances." (WANCHOO J.)

Vanguard Fire & General Insurance Co. v. *M/s. Fraser & Ross*, 1960 SC 971 : (1960) 30 Com Cas 13 : 1960 (2) SCA 563.

An artificial definition may include a meaning different from, or in excess of the ordinary acceptation of the word defined ; but there must then be compelling words to show that such a meaning is intended. When within the framework of the ordinary acceptation of the word, every single requirement of the definition is fulfilled, it will be wrong to take the definition as destroying the essential meaning of the word defined. (S. K. DAS J.)

Hariprasad Shivashankar Shukla v. *A. D. Divelkar*, 1957 SCR 121 : 1957 SC 121 : 1957 SCJ 83 : 1957 SCA 57 : (1957) 11 FJR 317 : 1957 (1) Lab LJ 243 : 59 Bom LR 384.

In dealing with an inclusive definition, it would be inappropriate to put a restrictive interpretation upon terms of a wider denotation.
(GAJENDRAGADKAR J.)

State of Bombay v. *Hospital Mazdoor Sabha*, 1960 (2) SCR 866 : 1960 SC 610 : 1960 SCJ 679 : 1960 (2) SCA 243 : 62 Bom LR 553.

10. MEANING OF WORDS AND EXPRESSIONS

The same word appearing in the same section of the same set of rules must be given the same meaning, unless there is anything to indicate to the contrary.
(BOSE J.)

Guruswamy v. *State of Mysore*, 1954 SC 592 : 1955 (1) SCR 305 : 1954 SCJ 644 : 1954 SCA 993 : (1955) Mys 279.

It is reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act. But the presumption is very slight, and it is proper, if sufficient reason can be assigned to construe a word in one part of an Act in a different sense than that which it bears in another part of the Act.
(VENKATARAMA IYER J.)

Sham Rao Vishnu Parulekar v. *District Magistrate, Thana*, 1956 SCR 644 : 1957 SC 23 : 1956 SCJ 710 : 1956 SCA 1132 : 1956 SCC 504 : 1957 ALJ 33 ;

1957 (1) MLJ (Cri) 23 : 1957 Cr LJ 5 : 1957 BLJR 1 : 59 Bom LR 83 : 1957 MPC 34.

If the words are capable of one meaning alone then it must be adopted, but if they are susceptible of wider import, the Courts have to pay regard to what the statute or the particular piece of legislation had in view.

(1911) A.C. 641 Referred to. (CHANDRASEKHARA IYER J.)

D. N. Banerji v. *P. R. Mukherji*, 1953 SC 58 : 1953 SCR 302 : 1953 SCJ 19 : 1953 SCA 303 : 8 DLR SC 183 : 1953 (1) MLJ 195.

It is a recognised principle of construction that general words and phrases however wide and comprehensive they be in their literal sense must usually be construed as being limited to the actual objects of the Act in which they occur. (KAPUR J.)

Central India Spinning and Weaving and Manufacturing Co. v. *Municipal Committee, Wardha*, 1958 SCR 1102 : 1958 SC 341 : 1958 SCJ 604 : 1958 MPLJ 775 : 1958 Nag LJ 595.

Rule of *ejusdem generis*.

The true scope of the rule of *ejusdem generis* is that words of a general nature following specific and particular words should be construed as limited to things, which are of the same nature as those specified and not its reverse, that specific words which precede are controlled by the general words which follow.

Amar Singhji v. *State of Rajasthan*, 1955 (2) SCR 164 : 1955 SC 504 : 1955 SCA 766 : 1955 SCJ 523.

The rule of *ejusdem generis* must be confined within narrow limits, and general or comprehensive words should receive their full and natural meaning, unless they are clearly restrictive in their intendment ; it is requisite that there must be a distinct genus, which must comprise more than one species, before the rule can be applied. (CHANDRASEKHARA IYER J.)

State of Bombay v. *Ali Gulshan*, 1955 (2) SCR 867 : 1955 SC 810 : 1956 SCA 17 : 1955 SCJ 822 : 58 Bom LR 490 : 1956 SCC 117.

The rule of *ejusdem generis* giving a restricted meaning to general words following particular and specific words has to be applied only when the context of the whole scheme of legislation requires it. But where the context does not require such restricted meaning, the Court must give the words their plain and ordinary meaning.

Held, the words "or otherwise" in S. 6 (a) of the Bombay Land Requisition Act, 1948 have not been used *ejusdem generis* with the preceding clauses but in an all inclusive sense. (SINHA J.)

Lilavati Bai v. *State of Bombay*, 1957 SC 521 : 1957 SCA 465 : 1957 SCJ 557.

Rule of *noscuntur a sociis*.

The rule *noscuntur a sociis* means, that when two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. The more general is restricted to a sense analogous to a less general. The rule applies only when the intention of the Legislature in associating wider words with words of narrower significance is doubtful or is otherwise not clear. It can also be applied when the meaning of the words of

wider import is doubtful, but when the object of the Legislature in using words of wider sense is clear and free of ambiguity, the rule cannot be applied.
(GAJENDRAGADKAR J.)

State of Bombay v. *Hospital Mazdoor Sabha*, 1960 SCJ 679 : 1960 SC 610 : 1960 (2) SCR 866 : 1960 (2) SCA 243 : 62 Bom LR 553 : 1960 (1) Lab LJ 251 : 1960 Nag LJ 481 : 17 FJR 423.

11. LACUNA AND MISTAKES

While, no doubt it is not permissible to supply a clear and obvious lacuna in a statute and imply a right of appeal, it is incumbent upon the Court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application. (JAGANNADHADAS J.)

Rao Shiv Bahadur Singh v. *State of Vindhya Pradesh*, 1953 SC 394 : 1953 SCR 1188 : 1953 SCJ 563 : 1953 SCA 803 : 8 DLR SC 517 : 54 Cr LJ 1480.

It is not competent to any Court to proceed on the assumption that the Legislature has made a mistake. It must proceed on the footing that the Legislature intended what it has said. Even if there is some defect in the phraseology used by the Legislature, the Court cannot add, and amend, or, by construction, make up deficiencies which are left out in the Act. Even where there is *casus omissus* it is for the others than the Courts to remedy the defect.

(1891) A.C. 531 and 60 Ind. App. 13 Referred to. (S. R. Das J.)

Nalinakhya Bysack v. *Shyamsunder Haldar*, 1953 SC 148 : 1953 SCR 533 : 1953 SCJ 201 : 1953 SCA 191.

Where in construing a section, the court has to supply some words to make the meaning of the statute clear, a construction which is more in consonance with reason and justice should be preferred. (SINHA J.)

Ramaswamy Nadar v. *State of Madras*, 1958 SCR 739 : 1958 SC 56 : 1958 SCJ 343 : 1958 Cri LJ 228 : 1958 (1) An WR 143 : 1958 (1) MLJ 143 : 1958 All WR 386 : 1958 MLJ (Cri) 306.

12. LEGAL FICTION

It is well settled that in construing a legal fiction, it would be proper and even necessary to assume all those facts on which alone the fiction can operate.
(VENKATARAMA IYER J.)

Commissioner of Income-tax, Delhi v. *S. Teja Singh*, 1959 SC 352 : 1959 SCJ 425 : 1959 Sup 1 SCR 394 : (1959) Punj 573 : 1959 (1) MLJ 154 : 35 ITR 408.

When a statute enacts that something shall be deemed to have been done which in fact was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to, and full effect must be given to that statutory fiction and it should be carried to its logical conclusion.

17 Ch.D. 746 (756) and (1952) A.C. 109 Referred to. (MAHAJAN J.)

State of Bombay v. *Pandurang Vinayak*, 1953 SC 244 : 1953 SCR 773 : 1953 SCJ 330 : 1954 SCA 293 : 8 DLR SC 448 : 55 Bom LR 526 : 54 Cr LJ 1094.

13. MANDATORY AND DIRECTORY PROVISIONS

There is no universal rule to aid in determining whether mandatory enactments shall be considered directory only, or obligatory with an implied nullification for disobedience. It is the duty of the Court to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

(1861) 30 L J Ch. 379 Rel. on. (JAGANNADHADAS J.)

H. N. Rishbud v. *State of Delhi*, 1955 SCR 1150 : 1955 SC 196 : 1955 SCA 258 : 1955 SCJ 283 ; 1955 Cri LJ 526 : (1955) Punj 135 : 1955 MWN 232 : 57 Pun LR 235 : 1955 (1) MLJ 173.

It is the substance that counts, and must take precedence over mere form. Some are vital and go to the root of the matter ; they cannot be broken ; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the provisions read as a whole, and provided no prejudice ensues ; and when the legislature does not itself state which is which, judges must determine the matter and, exercising a nice discrimination, sort out one class from the other along broad-based commonsense lines. (BOSE J.)

Pratab Singh v. *Shri Krishna Gupta*, 1956 (2) SCR 1029 : 1956 SC 140 : 1956 SCA 366 : 1956 SCJ 143.

Use of "shall."

It is one of the rules of construction that a statutory provision, employing the the word "shall" is not mandatory, unless non-compliance with it is made penal. (MAHAJAN C. J.)

Jagan Nath v. *Jaswant Singh*, 1954 SC 210 : 1954 SCR 892 : 1954 SCJ 257 : 1954 SCA 1111 : 9 DLR SC 239 : 1954 (1) MLJ 480.

An enactment in form mandatory might in substance be directory and the use of the word "shall" does not conclude the matter. (VENKATARAMA IYER J.)

Hari Vishnu Kamath v. *Ahmed Ishaque*, 1955 SC 233 : 1955 SCR 1104 : 1955 SCA 105 : 1955 SCJ 267 : 1955 Nag LJ 1 : 1955 (1) MLJ 157 : 1955 MWN 449 : 1955 All WR 339 : 1955 Andh LT (Civil) 350.

The use of the word "shall" in a statute, though generally taken in a mandatory sense does not necessarily mean that in every case it shall have that effect, that is to say, that, unless the words of the statute are punctiliously followed, the proceeding or the outcome of the prcceeding would be invalid. On the other hand, it is not always correct to say that where the word 'may' has been used, the statute is only permissive or directcry in the sense, that non-compliance with those provisions will not render the proceeding invalid.

Crawford on 'Statutory Construction', Art. 261 at p. 516 Referred to. (SINHA J.)

State of Uttar Pradesh v. *Manbodhan Lal*, 1958 SCJ 150 : 1957 SCA 1022 : 1957 All WR 710 : 1957 ALJ 921 : 1958 MLJ (Cri) 85 : 1957 SC 912.

The use of the word 'shall' is not conclusive on the question whether a statutory provision is mandatory. Because a statute uses in some provisions the word "shall" and in others the words "shall be lawful" or "may" it does not necessarily indicate thereby that provisions containing the word "shall" are to be understood as mandatory provisions. Each provision has to be considered by itself and the context in which the word "shall" occurs in it and the object of the provision and

other considerations may lead to the view, that in spite of the use of "shall," it is merely a directory provision. (SARKAR J.)

Drigraj Kuer v. *Amar Krishna Narain Singh*, 1960 SC 444 : 1960 (2) SCR 431 : 1960 (2) SCA 260 : 1960 SCJ 594 : 1960 All WR 283.

14. *NON-OBSTANTE* CLAUSE

The correct approach to the construction of a statutory provision containing a *non-obstante* clause is to ascertain what the enacting part of the section provides on a fair construction of the words used according to their natural and ordinary meaning, and the *non-obstante* clause is to be understood as operating to set aside as no longer valid anything contained in any relevant existing laws which is inconsistent with the new enactment. The enacting part of a statute must, where it is clear, be taken to control the *non-obstante* clause where both cannot be read harmoniously ; for even apart from such a clause, a later law abrogates earlier laws clearly inconsistent with it ; *Posteriores leges oriores contravias abrogant*. (Broom's Legal Maxims, 10th Edn. p. 347). (PATANJALI SASTRI C. J.)

Aswini Kumar Ghosh v. *Arabinda Bose*, 1952 SC 369 : 1953 SCR 1 : 1952 SCJ 568 : 1952 SCA 683 : 8 DLR SC 92.

If the words of an enactment are clear and are capable of only one interpretation on a plain and grammatical construction of the words thereof, a *non-obstante* clause cannot cut down the construction and restrict the scope of its operation. In such cases the *non-obstante* clause has to be read as clarifying the whole position and must be understood to have been incorporated by the Legislature by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment. (BHAGWATI J.)

Dominion of India v. *Shrinbai A. Irani*, 1954 SC 596 : 1955 (1) SCR 305 : 1955 (1) SCR 305 : 1954 SCJ 644 : 1954 SCA 993 : (1955) Mysore 279.

15. PROVISO & SAVING CLAUSE

It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (BHAGWATI J.)

Ram Narain Sons Ltd. v. *Asst. Commissioner of Sales-tax*, 1955 (2) SCR 483 : 1955 SC 765 : 1955 SCJ 808 : 1955 (2) MLJ 302 : 1955 (6) STC 627.

The territory of a proviso is to carve out an exception to the main enactment and exclude something which otherwise would have been within the section. It has to operate in the same field and if the language of the main enactment is clear it cannot be used for the purpose of interpreting the main enactment or to exclude by implication what the main enactment clearly says unless the words of the proviso are such that that is its necessary effect. (KAPUR J.)

Commissioner of Income-tax, Mysore v. *Indo Mercantile Bank*, 1960 (1) SCA 12 : 1959 SC 713.

The enacting clause, the saving clause and the proviso must be taken and construed together. Unless the words are clear, a proviso should not be so construed as to attribute to the legislature an intention to give with one hand and take away with the other. A sincere attempt should be made to reconcile the enacting clause and the proviso and to avoid repugnancy between the two. (SUBBA RAO J.)

Tahsildar Singh v. *State of Uttar Pradesh*, 1959 SC 1012 : 1959 SCJ 1042 : 1959 Sup 2 SCR 875 : 1960 (1) SCA 201 : 1959 (2) MLJ 201 : 1959 MLJ (Cr) 759 : 1959 Cr LJ 1231 : 1959 (2) An WR 201 : 1959 All WR 522.

Ordinarily a proviso is not interpreted as stating a general rule. But provisos are often added not as exceptions or qualifications to the main enactment but as saving clauses in which cases they will not be construed as controlled by the section. (HIDAYATULLAH J.)

Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. *Subash Chandra Yograj Sinha*, 1961 SC 1596.

16. PARTICULAR ENACTMENTS

One Act applying another Act.

There is no precedent or warrant for an assumption that when one Act applies another Act to a certain territory, the latter Act must be taken to be incorporated in the former Act. (HIDAYATULLAH J.)

R. M. Agencies v. *Union of India*, 1961 SC 56.

Amending Acts.

Where a subsequent Act amends an earlier Act in such a way as to incorporate itself, or a part of itself into the earlier, then the earlier Act must be read and construed (except when it would lead to a repugnancy, inconsistency, or absurdity) as if the altered words had been written into the earlier Act itself, and the old words scored out, so that thereafter there is no need to refer to the amending Act at all. This is the rule in England and America. It also applies to India.

Craies on Statute Law, 5th Edn. p. 207, Crawford on Statutory Construction, page 110 and 54 Ind. App. 152 Referred to. (BOSE J.)

Sham Rao v. *District Magistrate, Thana*, 1952 SC 324 : 1952 SCR 683 : 1952 SCJ 476 : 1952 SCA 635 : 7 DLR SC 380 : BLR 1952 SC 358 : 54 Bom LR 877 : 53 Cr LJ 1503.

Whenever an amended Act has to be applied subsequent to the date of the amendment, the various unamended provisions of the Act have to be read along with the amended provisions as though they are part of it. This is for the purpose of determining what the meaning of any particular provision of the Act as amended is, whether it is in the unamended part or in the amended part.

However, where what one is concerned with is not the meaning of any particular phrase or provision of the Act after the amendment, but the effect of the amending provisions in their relation to and effect on other statutory provisions outside the Act, the amendment cannot obviously be treated as having been part of the original Act itself so as to enable the doctrine to be called in aid that a later Act overrides an earlier Act. (JAGANNADHADAS J.)

Ram Narain v. *Simla Banking & Industrial Co., Ltd.*, 1956 SCR 603 : 1956 SC 614 : 1956 SCJ 579 : 1956 SCA 893 : 26 Comp Cas 280 : (1956) Punj 1321 : 59 Pun LR 1.

In every case the language of the amending statute has to be examined to find out whether the legislature clearly intended even pending proceedings to be affected

by such statute. Where there are no saving clauses in express or implied terms, the amendment must be held to be intended to apply to all pending cases.

63 Ind. App. 47 Rel. on. (SINHA J.)

Shyabuddinsab M. Akki v. *Gadag Municipality*, 1955 SCR 1268 : 1955 SC 314 : 1955 SCA 709 : 1955 SCJ 316 : 57 Bom LR 671.

There is a presumption against implict alteration of law and it may be presumed that the Legislature does not intend to make a substantial alteration in the law beyond what it expressly declares.

(1952) 2 QB 648 Referred to. (BHAGWATI J.)

M. K. Ranganathan v. *Government of Madras*, 1955 SC 604 : 1955 SCA 841 : 1955 SCJ 515 : 1955 (25) Com Cas 344 : 1955 (2) MLJ 68 : 1955 MWN 805 : 69 MLW 10 : 1955 (2) SCR 374.

Fiscal enactments.

In construing words of a fiscal statute, if there are two possible interpretations then effect is to be given to the one that favours the citizen and not the one that imposes a burden on him. (KAPUR J.)

Central India Spinning and Weaving and Manufacturing Co. v. *Municipal Committee, Wardha*, 1958 SCR 1102 : 1958 SC 341 : 1958 SCJ 604 : 1958 MPLJ 775 : 1958 Nag LJ 595.

In construing fiscal enactments regard must be had to the strict letter of the law and not merely to the spirit or substance of the statute. If the State satisfies the Court that the case falls strictly within the four corners of the statute the subject can be taxed ; otherwise no tax can be imposed by inference or analogy, or by trying to probe into the intentions of the Legislature and considering what was the substance of the matter. (BHAGWATI J.)

A. V. Fernandez v. *State of Kerala*, 1957 SC 657 : 1957 SCA 983 : 1957 SCJ 689 : (1957) 8 STC 561 : 1957 KLT 705 : (1957) Ker 706 : 1957 (2) MLJ 129 : 1957 (2) An WR 129.

The principle of liberal construction of fiscal enactments is not applicable, unless it is shown that the section is capable of two constructions. Where the meaning is plain and clear, the question whether or not the effect of the section is equitable, fair or just is irrelevant. (GAJENDRAGADKAR J.)

Bhibhuti Bhusan Chatterjee v. *State of Bihar*, 1960 (1) SCR 935 : 1960 SC 128 : 1960 SCJ 179 : 1960 Cr LJ 171 : 1960 MLJ (Cr) 99 : 1960 BLJR 138.

The sound rule of extending severability to include separability in enforcement, should be applied in dealing with taxing statutes in this country. Therefore those statutes imposing tax on subjects divisible in their nature which do not exclude in express terms subjects exempted by the Constitution should not be declared wholly *ultra vires*. It is always feasible, in such cases, to separate taxes levied on authorised subjects, and those on exempted subjects and exclude the latter in the assessment of the tax. Therefore, in such cases, the statute itself should be allowed to stand, the taxing authority being prevented by injunction from imposing tax on subjects exempted by the Constitution.

(PATANJALI SASTRI C. J.)

State of Bombay v. *United Motors Ltd.*, 1953 SC 252 : 1953 SCR 1069 : 1953 SCJ 373 : 1953 SCA 408 : 8 DLR SC 294 : 55 Bom LR 536 : 1953 (1) MLJ 743 : 66 LW 577 : 1953 STC 133.

Penal statutes.

In penal statutes words of ambiguous meaning should be interpreted in a broad and liberal sense so that they will not become traps for honest, unlearned (in the law) and unwary citizens. (BOSE J.)

Seksaria Cotton Mills v. *State of Bombay*, 1953 SC 278 : 1953 SCR 825 : 1953 SCJ 355 : 1954 SCA 299 : 8 DLR SC 343 : 56 Bom LR 1 : 54 Cr LJ 1116.

If two possible and reasonable constructions can be put upon a penal provision in a statute, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty.
(MAHAJAN C. J.)

Tolaram v. *State of Bombay*, 1954 SC 496 : 1955 (1) SCR 158 : 1954 SCJ 547 : 1954 SCA 965 : 56 Bom LR 1206 : 55 Cr LJ 1333.

Procedural laws.

Our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence, and that they should not be precluded from participating in them. They should be construed, wherever that is reasonably possible, in the light of that principle.

(1951) 1 Raj 311 Disapproved. (BOSE J.)

Sangram Singh v. *Election Tribunal, Kotah*, 1955 (2) SCR 1 : 1955 MWN 844 : 69 LW 1 : 10 Elec LR 293.

It is a sound rule of construction that procedural enactments should be construed liberally and in such a manner as to render the enforcement of substantive rights effective. (VENKATARAMA IYER J.)

Veluswami Thevar v. *Raja Nainar*, 1959 SC 422 : 1959 SCA 424 : 1959 Sup 1 SCR 623 : 17 Elec LR 181 : 1959 SCJ 751 : 1959 (2) MLJ 48 : 1959 (2) An WR 48.

Temporary Acts.

The general rule in regard to temporary statutes is that, in the absence of special provision to the contrary, proceedings being taken against a person thereunder will *ipso facto* terminate on the expiry of the statute.
(PATANJALI SASTRI J.)

Krishnan v. *State of Madras*, 1951 SC 301 : 1951 SCR 621 : 1951 SCJ 453 : 7 DLR SC 1 : 64 LW 945 : BLR 1951 SC 294 : 1951 (2) MLJ 105 : 52 Cr LJ 1103.

War-time measure.

War-time measures which have often to be enacted hastily to meet a grave passing national emergency in which the very existence of the State is at stake, should be construed more liberally in favour of the State than peace-time legislation. (BOSE J.)

State of Bombay v. *Virkumar*, 1952 SC 335 : 1952 SCR 877 : 1952 SCJ 496 : 1952 (2) MLJ 332 : 1952 MWN 540 : 1952 Cr LJ 1406 : 1952 AWR (Sup) 99 : 54 Bom LR 883 : 1952 SCA 764 : 7 DLR SC 369.

JAGIR—**Nature of.**

Ordinarily a Jagir is an assignment in land or money for the support of a certain dignity and for the troops annexed thereto. It is either conditional or unconditional. The assignment is for a stated term, and more usually, it is for the lifetime of the holder, lapsing on his death to the State, although not unusually renewed to his heir on payment of a *nazarana* or fine. It is sometimes specified to be a hereditary one.

Umrao Singh v. *Bhagwati Singh*, 1956 SC 15 : 1956 SCC 62.

Jagir in the Punjab—Nature of.

The holder of property which was a part of *Cis Sutlej* States does not own the property absolutely but holds it only as a limited owner. (GAJENDRAGADKAR J.)

Satinder Singh v. *Umrao Singh*, 1961 SC 908.

Resumption.

Under the law a Jagir can be resumed only under certain circumstances. It can be resumed for breach of the terms of the grant, such as failure to render services or perform the obligations imposed by the grant. It can be resumed for rebellion or disloyalty or for the commission of serious crimes. Jagir was originally a life-grant and when the holder died, it reverted back to the State and succession to the estate was made under a fresh grant from the State and not by inheritance even when the successor was the heir of the deceased holder.

Amar Singhji v. *State of Rajasthan*, 1955 (2) SCR 164 : 1955 SC 504 : 1955 SCA 766 : 1955 SCJ 523.

JUDGE—**bias—disqualification—principles.**

Principles governing the doctrine of "Bias" *vis-a-vis* judicial tribunals are well settled and they are : (i) no man shall be a judge in his own cause, (ii) justice should not only be done but manifestly and undoubtedly seem to be done.

The two maxims yield the result that if the member of a judicial body is subject to a bias (whether financial or other) in favour of or against any party to a dispute or is in such a position that a bias must be assumed to exist, he ought not to take part in the decision or sit on the Tribunal and that any direct pecuniary interest, however small, in the subject matter of enquiry will disqualify a judge and any interest though not pecuniary will have the same effect if it be sufficiently substantial to create a reasonable suspicion of bias.

The said principles are equally applicable to authorities who though they are not courts of justice or judicial tribunals have to act judicially in deciding the rights of others i.e., authorities who are empowered to discharge quasi-judicial functions. (SUBBA RAO J.)

Gullapalli Nageswara Rao v. *State of Andhra Pradesh*, 1959 SC 1376.

Tribunals.

The principle "*nemo debet esse judex in causa propria sua*" precludes a justice who is interested in the subject matter of a dispute from acting as a justice therein.

This principle applies not only to the justices as mentioned by Halsbury (in Laws of England Vol. XXI, p. 535) but to all tribunals and bodies which are given jurisdiction to determine judicially the rights of parties (e.g., the Tribunal constituted by the High Court to enquire into the alleged misconduct of an advocate under S. 10 of the Bar Councils Act, 1926).

In dealing with cases of bias attributed to members constituting tribunals it is necessary to make a distinction between pecuniary interest and prejudice so attributed. Pecuniary interest, however small it may be, in the subject matter of the procedings would wholly disqualify a member from acting as a judge. But where pecuniary interest is not attributed but instead a bias is suggested, it often becomes necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice. It would always be a question of fact to be decided in each case.

Where the facts are such that the judge is disqualified from working as such by reason of a bias against a particular party it is not necessary for the party to prove that any prejudice in fact had been caused or that the judge had been improperly influenced in his final decision. Actual proof of prejudice may make the party's case stronger but it is not necessary to sustain the plea that the tribunal was not properly constituted. Hence it cannot be contended that the decision of the tribunal cannot be challenged unless it is shown that the defective constitution had in fact led to the prejudice of the party. (GAJENDRAGADKAR J.)

Manaklal v. *Dr. Premchand*, 1957 SCR 575 : 1957 SC 425 : 1957 SCA 719 : 1957 SCJ 339 : 1957 (1) MLJ 254.

Waiver of plea.

An objection to the defective constitution of a tribunal on the ground of alleged bias in a member against a party can be waived. But such bias does not invalidate the proceedings if it is shown that the objection had not been taken by the party even though he knew about the circumstances giving rise to the allegations about the bias and was aware of his right to challenge the constitution of the tribunal. But waiver cannot always in every case be inferred from the failure to take the objection. It can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection.

Where the circumstances make it clear that a party wanted to take a chance to secure a favourable decision from the tribunal which was constituted and when he found that he was confronted with an unfavourable decision he adopted the device of raising the technical point as to defective constitution of the tribunal, the party would be precluded from raising the point at a later stage of the proceedings by waiver or acquiescence. (GAJENDRAGADKAR J.)

Manaklal v. *Dr. Premchand*, (*ibid*).

LAND ACQUISITION ACT, 1857, **Sec. 8—Government's right to assess.**

When Government acquires lands under the Act, it must be for a public purpose and it acquires the sum total of all private interests subsisting in them. If the Government has itself an interest in the land, it has only to acquire the other interests outstanding therein, so that it might be in a position to pass it on absolutely for public user.

When Government possesses an interest in land which is the subject of acquisition under the Act, that interest is itself outside such acquisition.

34 Bom 618 and 9 I C 341 (Mad) Approved.

But the right of the Government to levy assessment is not an interest in land within the meaning of S. 8. In land acquisition proceedings, the prerogative right of the Government to levy assessment is not the subject matter of those proceedings. (VENKATARAMA IYER J.)

Collector of Bombay v. *Nusserwanji*, 1955 SCR 1311 : 1955 SC 298 : 1955 SCJ 339 : 1955 SCA 692 : 57 Bom LR 723.

LAND ACQUISITION ACT, 1894.

Validity.

Even if the Act contemplated acquisition for a company which may or may not be for a public purpose, it will be saved by Art. 31 (5) of the Constitution as an existing law. (SINHA C. J.)

Barkya Thakur v. *State of Bombay*, 1960 SC 1203

S. 4—effect of notification.

The purpose of the notification under S. 4 is to carry on a preliminary investigation with a view to finding out after necessary survey and taking of levels and if necessary, digging or boring into the subsoil, whether the land is adapted for the purpose for which it is sought to be acquired. It is only under S. 6 that a final declaration has to be made by the Government that land with proper description is needed for a public purpose or a company. What was a mere proposal under S. 4 becomes the subject matter of a definite proceeding for acquisition, particularly when the acquisition is for a company. (SINHA C. J.)

Barkya Thakur v. *State of Bombay*, (*ibid.*).

Wording of notification.

It is not absolutely necessary for the validity of the acquisition proceedings that a statement that the land sought to be acquired is needed for a public purpose should find a place in the notification actually issued. The requirements of the law will be satisfied if, in substance, it is found on investigation and the appropriate Government is satisfied as a result of the investigation that the land was needed for a public purpose. (SINHA J.)

Barkya Thakur v. *State of Bombay*, (*ibid.*).

S. 10—mortgagee.

A mortgagee is a "person interested" within the meaning of S. 10. (MAHAJAN J.)

Rajalakshmi Dassi v. *Banamali Sen*, 1953 SC 33 : 1953 SCR 154 : 8 DLR SC 75 : 1952 SCJ 618 : 1953 SCA 22.

S. 11—encumbrance.

The word 'encumbrance' in this section cannot include the right of the Government to levy assessment on land. (VENKATARAMA IYER J.)

Collector of Bombay v. *Nusserwanji*, 1955 SCR 1311 : 1955 SC 298 : 1955 SCJ 339 : 1955 SCA 692 : 57 Bom LR 723.

S. 18, Proviso Cl. (b)—award not communicated—starting point of limitation.

It will be unreasonable to construe the words "from the date of the Collector's award" used in Cl. (b) to the proviso to section 18 in a literal or mechanical way. For the award, whether treated as no more than an offer made on behalf of the Government to the owner of the property of the compensation determined or as an administrative decision taken by the Collector in the matter of valuation of the property, must involve the communication of the award to the party concerned either actually or constructively. Hence the expression "the date of the award"

in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively.

Case law discussed. 1954 Bombay 419 and 1958 Kerala 272 Overruled.

The claimant filed his claim to compensation before the Land Acquisition Officer and proceedings were held. On 25-3-1951 an award was made, signed and filed in the office of the Collector but was not communicated to the claimant as required by S. 12 (2). On 24-2-53 the claimant filed an application under S. 18 requiring the matter to be referred to the Court, alleging that he received information about the making of the award only on 13-1-1953. It was contended by the Government that the application was barred by time.

Held (overruling the contention), the application was within time and had to be dealt with in accordance with law. (GAJENDRAGADKAR J.)

Harish Chandra Raj Singh v. *Deputy Land Acquisition Officer*, 1961 SC 1500.

S. 23—valuation—considerations.

The function of the Court in awarding compensation is to ascertain the market value of the land at the date of the notification under section 4 (1) and the methods of valuation may be (1) opinion of experts, (2) price paid within a reasonable time in bonafide transactions of purchase of lands acquired or lands adjacent to the lands acquired and possessing similar advantages and (3) a number of years' purchase of the actual or the immediately prospective profits of the land acquired.

The purpose for which the land was acquired, the report of certain authorities as to its unsuitability for the purpose for which it was acquired and the delay in putting the land to the use for which it was acquired are extraneous considerations having no bearing on the question of valuation. (S. K. DAS J.)

Special Land Acquisition Officer v. *Adinarayan Setty*, 1959 Sup 1 SCR 404 : 1959 SC 429 : 1959 SCJ 431.

Interest.

On a reference under S. 18, the Court enhanced the compensation awarded by the Land Acquisition Officer. On behalf of the Government it was represented on 8-7-48 that the matter of filing an appeal against the order was under consideration and that therefore the enhanced compensation should not be paid to the claimant, and therefore the amount though in Court deposit was not paid to the claimant. An appeal was filed by the Government and an application was made to the High Court for stay of delivery of the amount. The High Court passed a final order that unless the Government agreed to pay interest stay could not be granted. The condition was not fulfilled and the stay petition was dismissed on 12-5-1949. The appeal however was allowed and the compensation awarded by the lower Court was reduced. The claimant appealed.

Held, while allowing the appeal and restoring the compensation awarded by the first Court, the claimant was entitled to interest at 6% as provided in the Act, on the additional amount awarded from 8-7-48 till 12-5-1949.

(GOVINDA MENON J.)

Government of Uttar Pradesh v. *H. S. Gupta*, 1957 SC 202.

S. 26 (2)—valuation—interference in appeal.

The Supreme Court will not interfere unless there is some thing to show not merely that on the balance of evidence it is possible to reach a different conclusion but that the judgment of the lower Appellate Court cannot be supported by reason of a wrong application of principle or because some important point affecting valuation has been overlooked or misapplied. (S. K. DAS J.)

Special Land Acquisition Officer v. *Adinarayan Setty*, 1959 Sup 1 SCR 404 : 1959 SC 429 : 1959 SCJ 431.

S. 30—Right of mortgagee—*Res Judicata*.

In view of the provisions of sections 9, 10, 18 and 30 it is evident that if a mortgagee actually intervenes in the land acquisition proceedings and makes a claim for the compensation and any question of title arises about the right of the mortgagor in respect to the land acquired which affects the claim for compensation, he has every right to protect that title. If such a dispute as to the title to receive the compensation is referred to the court and decided by it, the decree thereon not appealed from renders the question of title *res judicata* in a suit between the parties to the dispute.

49 Ind. App. 129 and 66 Ind. App. 145 Relied on. (MAHAJAN J.)

Rajalakshmi Dassi v. *Banamali Sen*, 1953 SC 33 : 1953 SCR 154 : 8 DLR SC 75 : 1952 SCJ 618 : 1953 SCA 22.

S. 32 (1) (b)—applicability.

The scheme of section 32 is that in cases to which the section applies the Court shall order the compensation amount to be invested in the purchase of other lands which would be held under the right, title and conditions of ownership as the land in respect of which the compensation amount has been deposited. That is the plain effect of section 32 (1) (a) ; section 32 (1) (b) which is intended to apply only provisionally and for a short period comes into operation if such purchase cannot be effected forthwith and it has to remain in operation till such purchase is made. Hence the argument that in cases where the holder of land acquired is not the absolute owner of the property and other persons are entitled to represent the reversionary interest in the same, since the holder is not entitled to alienate the property and is under an obligation to keep the corpus intact for the benefit of the reversioners, the compensation amount should be treated as a conversion of the corpus of lands and should not be divided between the claimants but should be permanently invested cannot be accepted. (GAJENDRAGADKAR J.)

Satinder Singh v. *Umrao Singh*, 1961 SC 908.

S. 34—Apportionment between limited owner and reversioner.

Where the holder for the time being of the land acquired was not the absolute owner thereof and another person was entitled to represent the reversionary interest in the same, the Supreme Court directed that the amount of compensation should be divided half and half between the two claimants. (GAJENDRAGADKAR J.)

Satinder Singh v. *Umrao Singh*, 1961 SC 908.

Land Acquisition Act, 1894 (as amended in Punjab), Ss. 6, 17 (2) (b) and Part VII—Acquisition for company—Validity of the Act.

The essential condition for acquisition for a public purpose is that the cost of the acquisition should be borne wholly or in part, out of public funds. An acquisition for a company may also be made for a public purpose, within the meaning of the Act, if a part or the whole of the cost of acquisition is met by public funds. In such a case, it is not necessary to go through the procedure prescribed by Part VII. If on the other hand, the acquisition for a company is to be made at the cost entirely of the company itself, such an acquisition comes under the provisions of Part VII.

Reasoning in 1959 Punjab 535 held Erroneous ; 1960 SC 1203 Referred to. (SINHA C. J.)

Jhandu Lal v. *State of Punjab*, 1961 SC 343.

LEASE and agreement to grant lease—distinction.

An instrument is usually construed as a lease if it contains words of a present demise. It is construed as an executory agreement, notwithstanding that it contains words of present demise, where certain things have to be done by the lessor before the lease is granted such as the completion, repair or improvement of the premises or by the lessee such as the obtaining of sureties. (MAHAJAN C. J.)

Tolaram v. *State of Bombay*, 1954 SC 496 : 1955 (1) SCR 158 : 1954 SCJ 547 : 1954 SCA 965 : 56 Bom LR 1206 : 55 Cr LJ 1333.

Lease and License—distinction.

To ascertain whether a document creates a lease or only a license, the substance of the document must be preferred to the form. The real test is the intention of the parties.

If the document creates an interest in the property it is a lease ; but if it only permits another to make use of the property of which the legal possession continues with the grantor it is a license.

If under the document a party gets exclusive possession of the property, *prima facie*, he is considered to be a tenant but circumstances may be established negativing the intention to create a lease.

(per SUBBA RAO J. in his dissenting Judgment.)

(**Note** :—Out of the two other Judges who formed the majority S. K. DAS J. agreed with SUBBA RAO J. on this point while SARKAR J. did not express any opinion and decided the case on another point).

Associated Hotels of India v. *R. N. Kapoor*, 1960 SCJ 453 : (1959) Punj 1897 : 1959 SC 1262 : 1960 (1) SCR 368 : 1960 (2) SCA 1.

Map attached to lease deed.

It is well settled that a map referred to in a lease should be treated as incorporated in the lease and forming part of the said document. Where the maps are drawn to scale and the boundary is clearly demarcated, the boundaries drawn in the plan can rightly be accepted without embarking upon an attempt to correct them with reference to revenue records. (SUBBA RAO J.)

K. S. Nanji & Co. v. *Jatashankar Dossa*, 1961 SC 1474.

Renewal clause—construction.

A lease deed containing a covenant for renewal provided that the rent should be subject to such fair and equitable enhancement as the lessor should determine on the grant of renewal and it was contended that the determination of enhancement by the lessor was final ;

Held (negativing the contention), it was open to the Court to determine what was fair and equitable enhancement. (S. K. DAS J.)

Mangalamurti v. *State of Bombay*, 1959 SC 639 : 1959 SCJ 760 : 1959 Sup 2 SCR 180 : 1959 (2) SCA 47 : 1959 Nag LJ 149 : 1959 MPLJ 393.

Underground rights—ownership.

It is well settled that a *Zamindar* is presumed to be the owner of the under-

ground rights in the tenancies created by him in the absence of evidence that he ever parted with them. (FAZL ALI J.)

Sukhdev Singh v. *Maharaja Bahadur of Girdhaur*, 1951 SCR 534 : 1951 SC 288 : 1951 SCJ 386 : 30 Patna 931 : 1951 ALJ 141.

LEGAL MAXIMS—**"approbate and reprobate".**

The maxim that "a person cannot approbate and reprobate" is only an application of the doctrine of election, and its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. (VENKATARAMA IYER J.)

Nagubai v. *Shama Rao*, 1956 SCR 451 : 1956 SC 593 : 1956 SCA 959 : 1956 SCJ 955 : 1956 SCC 321 : (1956) Mys 152 : 1956 An LT 1029.

"Falsus in uno falsus in omnibus".

The rule of *falsus.....omnibus* is merely a rule of caution and has not come to occupy the status of a rule of law. It amounts only to that, in such cases, the testimony may be disregarded and not that it must be disregarded. (KAPUR J.)

Nissar Ali v. *State of Uttar Pradesh*, 1957 SCR 657 : 1957 SC 366 : 1957 SCA 312 : 1957 Cr LJ 550 : 1957 MPC 346 : 1957 BLJR 352 : 1957 (1) MLJ 314 : 1957 All WR 461 : 1957 All LJ 447 : 1957 SCC 128 : 1957 SCJ 392.

LEGAL PRACTITIONER—**Professional misconduct—unspent out-fees.**

One M, an Advocate of the Supreme Court (previously Agent) withdrew from Court the unspent balance out of the printing charges without the knowledge of his client and refused to refund it on demand claiming to have appropriated it towards balance of fees said to be due to him.

Held, M was guilty of professional misconduct ; the fact that he might have honestly believed that he was justified in adopting the course or the absence of any specific rules governing particular situation was not any reason for accepting a less rigid standard. The absence of the rules increased the responsibility of the member of the profession.

When the monies of a client come into possession of an Agent or an Advocate, otherwise than as earmarked fees, he has to treat himself as in the position of a trustee for the client in respect of the said monies. Even if he has a lien, it would be improper for him to appropriate the same towards his fees without the consent, express or implied, of his client or without an order of the Court. When he is entitled to a lien, he has to give a reasonable intimation of the receipt as well as the exercise of his lien.

This position of trusteeship is all the greater when the money represents the unspent balance of what was given for a specific purpose, such as for payment of printing charges. It is well settled that on any *such* unspent balance he has no lien either under the common law or by the statute. (JAGANNADHADAS J.)

In re M, an Advocate, 1957 SCR 811 : 1957 SC 149 : 1957 SCJ 105 : 1957 SCA 229 : 1957 Cr LJ 300 : 1957 All WR (Sup) 34.

LEGAL PRACTITIONERS ACT, 1879, **Ss. 13 and 14—Professional misconduct—imputing partiality and unfairness to judge in open Court.**

A member of the Bar undoubtedly owes a duty to his client and must place before the Court all that can fairly and reasonably be submitted on behalf of his client. He may even submit that a particular order is not correct and may

ask for a review of that order. At the same time a member of the Bar is an officer of Court and owes a duty to the Court in which he is appearing. He must uphold the dignity and decorum of the Court and must not do anything to bring the Court itself into disrepute. A lawyer oversteps the limits of propriety when he makes imputations of partiality and unfairness against the judge in open Court. Scandalising a judge in open Court is really polluting the very fountain of justice. Such conduct brings into disrepute the whole administration of justice and is highly reprehensible. In such circumstances the lawyer is undoubtedly guilty of grave professional misconduct. (S. K. DAS J.)

Lalit Mohan Das v. *Advocate General, Orissa*, 1957 SCR 167 : 1957 SC 250 : 1957 SCA 569 : 1957 SCJ 230 : 1957 (1) MLJ 78 : 1957 SCC 164 : 1957 An LT 411 : 1957 (1) Andh WR 78.

Punishment.

The Munsif who held the inquiry into the misconduct of the pleader had recommended suspension of practice for a year. Subsequently the pleader had tendered a written apology and expressed regret. The High Court suspended him from practice for a period of five years. *Held*, though in a matter of this nature the Supreme Court will be reluctant to interfere with the order of the High Court as respects the disciplinary action to be taken, in the circumstances the punishment imposed erred on the positive side. (Period of suspension reduced to two years). (S. K. DAS J.)

Lalit Mohan Das v. *Advocate General, Orissa*, (*ibid.*).

LETTERS PATENT

[BOMBAY]—Cl. 15—decision by single judge in appeal under S. 76, Trade Marks Act.

S. 76, Trade Marks Act confers a right of appeal to the High Court and says nothing more about it. That being so, the High Court has to exercise that appellate jurisdiction in the same manner as it exercises its other appellate jurisdiction and when it is exercised by a single judge, his decision, being a "judgment" within the meaning of Cl. 15, is subject to appeal thereunder, there being nothing to the contrary in the Trade Marks Act.

1951 Bom 147 Affirmed. (MAHAJAN J.)

National Sewing Thread Co., Ltd. v. *James Chadwick & Bros.*, 1953 SC 357 : 1953 SCR 1028 : 1953 SCJ 509 : 1953 SCA 610 : 8 DLR SC 472 : 56 Bom LR 21 : 1953 (2) MLJ 215.

Reference to Government of India Act, 1915.

The reference in clause 15 to section 108 of the Government of India Act, 1915 should be read as a reference to the corresponding provisions in the Government of India Act, 1935, and the Constitution.

1951 Bom 147 Affirmed. (MAHAJAN J.)

National Sewing Thread Co., Ltd. v. *James Chadwick & Bros.*, (*ibid.*).

[CALCUTTA]—Cl. 12—revocation of leave.

When the defendant has not only acquiesced in the steps taken by the plaintiff to carry forward the progress of the suit incurring considerable expenses but also

made use of the existence of the suit to obtain such interlocutory reliefs as he thought would be to his own advantage and filed the application for revocation later.

Held, the proceedings had been allowed to reach a stage where it would result in grave injustice to hold that some other court was the *forum conveniens*.

(PATANJALI SASTRI J.)

Chittaranjan Mukherjee v. *Barhoo Mahto*, 1953 SC 472 : 87 CLJ 420.

Cls. 13 and 12.

There is a difference between an order refusing to rescind leave granted under cl. 12 and one under cl. 13 directing the removal of a suit from one Court to another and the principle applicable to one does not apply to the other. (MUKHERJEA J.)

Asrumati Debi v. *Kumar Rupendra Deb Raikot*, 1953 SC 198 : 1953 SCR 1159 : 1953 SCJ 300 : 1953 SCA 319 : 8 DLR SC 263 : 1953 (1) MLJ 710 : 66 LW 371.

Cl. 15—Judgment—order under clause 13.

An order under cl. 13 withdrawing a suit pending in a subordinate Court to be tried by the High Court in its extraordinary original Civil Jurisdiction is not a judgment within the meaning of cl. 15 and no appeal, therefore, lies from such an order made by a single judge.

1920 Cal 797 and 1935 Rangoon 267 Approved ; 47 Mad 1361 Overruled ; case law discussed. (MUKHERJEA J.)

Asrumati Debi v. *Kumar Rupendra Deb Raikot*, (*ibid.*).

Cls. 44 and 16.

The true intent and purpose of Cl. 44 was to supplement the provisions of Cl. 16 and other clauses. By force of this clause appellate jurisdiction conferred by fresh legislation on High Courts stands included within the appellate jurisdiction of the Court conferred by the Letters Patent.

(1946) 2 Calcutta 359 Overruled. (MAHAJAN J.)

National Sewing Thread Co., Ltd. v. *James Chadwick & Bros.*, 1953 SC 357 : 1953 SCR 1028 : 1953 SCJ 509 : 1953 SCA 610 : 8 DLR SC 472 : 56 Bom LR 21 : 1953 (2) MLJ 215.

[PATNA]—**Cl. 31—Bihar Sales Tax Act, S. 21—order under.**

An order of the High Court refusing to require the Board of Revenue to state a case under S. 21, B. S. T. Act cannot be regarded as a final order as it does not of its own force bind or affect the rights of the parties ; nor is it passed by the High Court in its original or appellate Jurisdiction as the High Court acquired jurisdiction to deal with the case by virtue of an express provision of a statute and therefore the jurisdiction is only consultative. The order is therefore not appealable.

1941 Patna 225 Approved ; 1931 Lahore 138 (FB) Disapproved. (FAZL ALI J.)

Premchand Satramdas v. *State of Bihar*, 1951 SC 14 : 1950 SCR 799 : 1951 SCJ 5 : 6 DLR (SC) 66 : 30 Pat 240 : 64 LW 554 : 19 ITR 108 : BLR 1951 SC 1 : 1951 CWN 161.

LIMITATION ACT, 1908

Specific and general articles.

When there is a specific article covering the case it is not proper to apply another article the applicability of which is not free from doubt.
(MUKHERJEA J.)

Kalipada Chakraborti v. *Palani Bala Devi*, 1953 SC 125 : 1953 SCR 503 : 1953 SCJ 209 : 1953 SCA 171 : 91 CLJ 252 : 1953 (1) MLJ 597 : 66 LW 524 : 8 DLR SC 228.

Suspension on principle of equity.

The rule of equity that fraud stops or suspends the running of time based on general principles of Jurisprudence cannot apply where there are statutory provisions regarding stoppage or suspension of limitation. While the courts necessarily are astute in checkmating or fighting fraud, it should be equally borne in mind that statutes of limitation are statutes of repose.
(CHANDRASEKHARA IYER J.)

Yeshwant v. *Walchand*, 1951 SC 16 : 1950 SCR 852 : 1951 SCJ 19 : 6 DLR (SC) 73 : 1951 ALJ 8 : 64 LW 353 : 1951 MWN 286 : 1951 RLW 193 : BLR 1951 SC 15 : 2 Raj LW 193 : 55 Bom LR 486.

S. 3—date of filing of appeal.

Where the memorandum of appeal is sent by post to the appellate authority, the date when the memorandum is received by the appellate authority must be taken to be the time when the appeal is filed and where that is beyond the period prescribed, the appeal will be clearly out of time even though the memorandum was posted by the appellant within time. (SARKAR J.)

F. N. Roy v. *Collector of Customs*, 1957 SC 648 : 1957 SCA 764 : 1957 SCJ 734 : 1957 Cr LJ 1026 : 1957 MLJ (Cr) 684.

S. 5 [Any appeal.....may be admitted after the period of limitation prescribed therefor, when the appellant.....satisfies the Court that he had sufficient cause for not preferring the appeal.....within such period.]

Two appeals from same judgment.

Two defendants preferred separate appeals from one decree and those were disposed of by a common judgment but two decrees were drawn up. The plaintiff filed one appeal within time impleading all the defendants as parties. He also filed another appeal beyond the period of limitation against the other decree. This latter appeal was dismissed as time-barred.

Held, the Court was in error in not giving the appellant the benefit of S. 5 because there was a conflict of decisions among the High Courts regarding the question whether it was necessary in such cases to file two appeals or whether one was sufficient.

Narhari v. *Shankar*, 1953 SC 419 : 1951 CWN SC 178 (Hyderabad Bench).

S. 7—"Discharge"—whether applies only to money claims.

There is no reason to think that the word "discharge" can refer only to debts and is wholly inappropriate in respect of any decree for possession, whether on partition or otherwise. For, except in the case of declaratory decrees or decrees

of a similar nature, the decree in favour of one person against another requires another to do something or to refrain from doing something. This liability is in a sense a debt which a party is in law bound to discharge. The ordinary use of the word judgment-debtor to denote a person against whom a decree has been made makes a clear recognition of this.

1955 All 186 Affirmed. (DAS GUPTA J.)

Sarda Prasad v. *Lala Jamna Prasad*, 1961 SC 1074.

Decree in favour of Hindu father and son—execution application by son.

Where in a partition suit a decree is passed in favour of a Hindu father and his son jointly, the managing member of the family can give a discharge of the liability under the partition decree by accepting delivery of possession on behalf of his minor son without his consent and hence time will run against the son also for an application for execution from the date of the decree. For under the Hindu law the Karta of a joint Hindu family represents all the members of the family and has the power and duty to take action which binds the family in connection with all matters of management of family property and there is nothing in order XXXII of the Code of Civil Procedure which debars the manager from giving discharge in respect of liability to deliver properties.

1955 All 186 Affirmed. (DAS GUPTA J.)

Sarda Prasad v. *Lala Jumna Prasad*, (*ibid.*).

S. 10 [.....no suit against the person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns (not being assigns for valuable consideration) for.....following.....such property....., shall be barred by any length of time.
.....]

Wakf property.

No question of limitation can arise in a suit for a declaration that property in the possession of the defendant is *wakf* property of which the defendant is the *mutawalli* and not his private property, when the property is found to be *wakf* property. (BOSE J.)

Mohammed Shah v. *Fasihuddin Ansari*, 1956 SC 713.

"Not being assigns for valuable consideration."

The word "assign" is sufficiently wide to cover a lessee as well. The expression "valuable consideration" has a well known connotation in law and it is not synonymous with adequate consideration. Thus the fact that judged by modern standards the rent reserved is small cannot make, if the rent is in no sense illusory, the lessee any the less an assign for valuable consideration. (MUKHERJEA J.)

Jagadguru Gurusiddhaswami v. *Dakshina Maharastra Digambar Jain Sabha*, 1953 SC 514 : 1954 SCR 235 : 1953 SCJ 730 : 1953 SCA 1025 : 9 DLR SC 12 : 56 Bom LR 783 : 1953 (2) MLJ 819 : 67 LW 12.

S. 12 (2)—Time requisite for obtaining copies.

Where an aggrieved party applies for the certified copy of the judgment and decree, before the decree is drawn up, the time requisite for obtaining the copies must necessarily include not only the time taken for the actual supply of the certified copy of the decree but also for the drawing up of the decree itself.

The unsuccessful party applied to the trial Court for a certified copy of the decree and judgment. The decree had not been drawn up and the Court supplied to him a certified copy of the judgment and the bill of costs. He preferred an appeal which was filed without the decree and only with the certified copy of the judgment and the bill of costs. The appeal was placed before the appellate Court for preliminary hearing under O. 41 R. 11 and was admitted and notice was served on the respondent. The respondent appeared and raised a preliminary objection that the appeal filed without a copy of the decree was incompetent. The next day the appellant moved the trial Court for drawing up the decree but the motion became infructuous as the record had been sent to the appellate Court. Thereafter the appellant applied to the appellate Court to declare the appeal to be maintainable or in the alternative for the record of the suit to be sent for getting a decree prepared. This application came up for hearing along with the appeal and the appellate Court overruled the preliminary objection, ordered the record to be sent back to the trial Court and allowed the appellant a month's time for getting a decree drawn up and obtaining a copy. A copy of the decree was eventually obtained by the appellant and filed in the appellate Court the same day and the question was whether the appeal which was thus properly filed with the copy of the decree was in time.

Held, the appellant deserved to be protected against the default committed or negligence shown by the Court or its officers in the discharge of their duties and that the time taken by the court for drawing up the decree after he had applied for a copy, must be treated as part of the time taken for obtaining the certified copy of the decree and therefore the appeal was in time.

(GAJENDRAGADKAR J.)

Jagat Dish Bhargawa v. *Jawahar Lal*, 1961 SC 832.

S. 14 [(1) In computing.....limitation.....for any suit, the time during which the plaintiff had been prosecuting with due diligence another civil proceeding..... against the defendant shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of like nature, is unable to entertain it.

(2) In computing.....limitation.....for any application, the time .....applicant has been prosecuting.....another Civil proceeding..... against the same party for the same relief shall be excluded.....]

Burden of proof.

The burden lies on the plaintiff affirmatively to show that the previously instituted suit was being prosecuted in good faith and with due diligence. The defendant cannot be expected to adduce evidence to the contrary. When the plaintiff has not satisfied the initial burden the burden will not shift, if it ever shifted, to the defendant to show the contrary.

In a plaint filed on the last day of limitation the plaintiff had not given the valuation of the suit for purposes of jurisdiction. Though the defendant had not raised an objection to the jurisdiction of the Court, the plaintiff after the suit had been pending in that court for a long time filed an application, after the dismissal by the same court of an earlier suit of the plaintiff of an analogous character in which the valuation had been given, to amend the plaint by including the valuation which he stated to be such as to be above the pecuniary jurisdiction of the Court. The application was allowed and the plaint was returned. It was represented on the same day to the proper Court where the defence was raised of limitation. The plaintiff relied on S. 14 (1) and contended that there was nothing to show that there was absence of good faith.

Held, the omission to state in the plaint the valuation which was all along in the plaintiff's knowledge while he had given the valuation in the other suit could not be brought within the condition of "due care and attention" necessary for "good faith" under the Limitation Act and the question was not whether the omis-

sion was *mala fide*. Moreover the plaintiff had not filed the order sheet or some equivalent evidence of the proceedings in the wrong Court to show that in spite of his due diligence the suit was pending for long and that therefore the plaintiff was not entitled to the benefit of S. 14. (B. P. SINHA J.)

Madhava Rao Narayan Rao v. *Ramakrishna Govind Bhanu*, 1959 SCR 564 : 1958 SC 767 : 1958 SCJ 963 : (1958) 2 MLJ 164 : 1958 (2) An WR 164 : 61 Bom LR 531.

Proceedings in execution of inexecutable award decree.

A dispute relating to partition between two brothers was referred to arbitration and an award was passed. It was filed into Court and a decree was passed in terms of the award. One of the brothers to whom certain properties were allotted under the award applied to execute the award decree. His application was dismissed. He succeeded in the appellate Court and in second appeal the application was dismissed on the ground that the Court which passed the award decree had no jurisdiction to do so and hence the decree could not be executed. Afterwards he filed a suit for possession of the property and pleaded in answer to a plea of limitation that he was entitled to deduct the period occupied by the infructuous execution proceeding. It was contended by the defendant that Sec. 14 (1) had no application to the case.

Held (negativing the contention), the execution proceedings were founded upon the plaintiff's claim to enforce his rights under the award decree and the executing court could not entertain the application because the decree was defective. The fact that the plaintiff went on to appeal where he succeeded for the nonce showed that there was no question of want of due diligence or good faith. The plaintiff was therefore entitled to the benefit of Section 14 (1). (S. R. DAS C. J.)

Raghunathdas v. *Gokalchand*, 1958 SC 827 : 1958 SCA 945 : 1958 SCJ 1067 : 1959 SCR 811 : (1958) Punj 2093.

Cl. (2)—insolvency proceedings.

The period occupied by the insolvency proceedings initiated by a decree-holder to get the judgment-debtor adjudicated insolvent cannot be excluded in computing the period of limitation for an application to execute the decree as the insolvency proceeding was not for obtaining the same relief as that sought in the execution application. The former is for the benefit of all the creditors but the latter is for the benefit of the decree-holder alone. That in the insolvency proceedings the decree-holder may be able to realise his debt wholly or in part is a mere coincidence of result. (CHANDRASEKHARA IYER J.)

Yeshwant v. *Walchand*, 1951 SC 16 : 1950 SCR 852 : 1951 SCJ 19 : 6 DLR SC 73 : 1951 ALJ 8 : 64 LW 353 : 1951 MWN 286 : 1951 RLW 193 : BLR 1951 SC 15 : 2 Raj LW 193 : 55 Bom LR 486.

S. 15 [(1) In computing.....limitation.....for any suit or application for execution of a decree.....which has been stayed by injunction or order, the time of the continuance of the injunction or order.....shall be excluded.

.....]

Applicability.

For excluding time under this section it must be shown that the institution of the suit in question had been stayed by an injunction or order and so in cases falling under S. 15 the party instituting the suit would by such institution be in contempt of court.

A suit was instituted against the members of the managing committee of a *waqf* for their removal and for settlement of a fresh scheme. The trial

court ordered their removal against which they preferred an appeal which was allowed. During the pendency of the appeal the *waqf* in suit was notified under the U. P. Muslim *Waqfs* Act, 1936. The members of the managing committee filed a suit under Sec. 5 (2) of the Act for a declaration that the *waqf* in question was outside the operative provisions of the Act and the Commissioner of *Waqfs* had no authority to supervise the management. In answer to a plea of limitation by the defendant the plaintiff sought to exclude the period of the pendency of the appeal in the previous suit under section 15 (1).

Held, the order of the trial court in the previous suit could not be contsrued as an order or injunction staying the institution of the present suit ; in fact the cause of action for the present suit arose after the order of the trial court and that therefore on a plain construction the order was not one which could attract the application of S. 15.

1954 All. 198 Affirmed. (GAJENDRAGADKAR J.)

Siraj-ul-Haq v. *Sunni Central Board of Waqfs U. P.*, 1959 SCR 1287 : 1959 SC 198 : 1959 SCJ 367 : 1959 ALJ 83 : (1959) All 8.

Considerations of equity.

S. 15 must be strictly construed without any consideration of equity.

56 Mad 490 Approved ; observation in 15 Ind. App. 211 held *obiter*.
((GAJENDRAGADKAR J.)

Siraj-ul-Haq v. *Sunni Central Board of Waqfs, U. P.*, (*ibid.*)

S. 18—plea under.

If the facts proved and found as established are sufficient to make out a case of fraud within the meaning of S. 18, the question of the applicability of the section being only a question of law can be raised at any stage and also in the final court of appeal for the first time.

1892 AC 473 Relied on. (CHANDRASEKHARA IYER J.)

Yeshwant v. *Walchand*, 1950 SCR 852 : 1951 SCJ 19 : 6 DLR SC 73 : 1951 SC 16 : 64 LW 353 : 1951 ALJ 8 : 1951 MWN 286 : 1951 RLW 193 : BLR 1951 SC 15 : 2 Raj LW 193 : 55 Bom LR 486.

S. 19 [(1) Where before the expiration of the period prescribed.....an acknowledgment has been made in writing signed by the party against whom such.....right is claimed .....a fresh period.....shall be computed from.....when the acknowledgment was so signed.

.....

Explanation II.....signed means signed either personally or by duly authorised agent in this behalf.]

Acknowledgment—usefulness of precedents.

In deciding the question as to whether any particular writing amounts to an acknowledgment, as in construing wills, for instance, it will not serve any useful purpose to refer to judicial precedents in the matter unless the words used in a given document are identical with the words used in a document judicially considered.
(GAJENDRAGADKAR J.)

Shapoor F. Mazda v. *Durga Prosad*, 1961 SC 1236.

Conditional acknowledgment.

A debtor wrote to the creditor as follows :—
I send herewith a statement of account showing Rs.....as due by me to you.

On your accepting the statement as correct, a cheque for the sum will be sent to you.

Held, the second sentence cannot be read as a condition to the statement made in the first sentence and therefore the argument that the acknowledgement was a conditional acknowledgment has to be rejected. (DAS GUPTA J.)

Mohd. Kamgharsha v. *Jagadish Chandra Das*, 1960 (3) SCR 604 : 1960 SC 953.

Implied acknowledgment.

Words used in an acknowledgment must indicate the existence of jural relationship between the parties such as that of debtor and creditor and it must appear that the statement is made with the intention to admit such relationship. The admission need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person intended to refer to a subsisting liability as at the date of the statement. In construing words used in the statement oral evidence has been expressly excluded but surrounding circumstances can always be considered. Stated generally the courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred or where the statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened to the maker by an involved or far fetched process of reasoning.

While certain property was being put up for sale at the instance of a prior mortgagee, the mortgagor wrote to the puisne mortgagee a letter in the following terms :—

"The property is again advertised for sale. I am afraid it will go very cheap.. As you are interested, why do not you take up the whole. There is only Rs. 70,000/- due to the (prior) mortgagee—a payment of Rs. 10,000/- will stop the sale".

In a suit on the puisne mortgage this letter was relied on by the mortgagee as an acknowledgment on the ground that the mortgagor therein admitted the jural relationship and appealed to him to avoid the sale as he had done on a previous occasion. The mortgagor contended that the interest referred to the puisne mortgagee's interest as an intending purchaser.

Held, the interest mentioned in the letter, in the circumstances, was the interest of the addressee as a puisne mortgagee and when the letter appealed to him to take the whole it could mean nothing other than the whole of the mortgagee's interest including the interest of the prior mortgagee and as there was no other jural relationship between the parties then and the only subsisting relationship was that of mortgagor and mortgagee, the letter acknowledged the existence of the said jural relationship and amounted to a clear acknowledgment under S. 19.

1955 Cal. 194 Affirmed. (GAJENDRAGADKAR J.)

Shapoor F. Mazda v. *Durga Prosad*, 1961 SC 1236.

Duly authorised agent.

The expression "duly authorised" includes duly authorised either by the action of the party indebted or by force of law or by order of the Court.

26 Bom 221 Approved. (DAS GUPTA J.)

Mohd. Kamgarhsha v. *Jagadish Chandra Das*, 1960 (3) SCR 604 : 1960 SC 953.

S. 20—acknowledgment of payment—when should be made.

Though it is the payment which really extends the period of limitation under S. 20, if there is not the acknowledgment in the prescribed form, the payment by

itself is of no avail. But while the section requires that the payment must be within the period prescribed, it does not require that the acknowledgment of the payment also should be within the period of limitation.

17 Mad. 92 Approved.

However, the acknowledgment in writing, whether made before or after the period of limitation, must be in existence prior to the institution of the suit. For the question of limitation has to be determined with reference to the date of plaint and the allegations made therein. To claim exemption under S. 20 the plaintiff must be in a position to allege and prove not only the payment but also the acknowledgment in writing. Unless both these elements are present on the date of the filing of the plaint, the suit will be barred. When there was no acknowledgment of the payment prior to suit but the defendants in their written statement admitted the payments, *held*, the requirements of S. 20 as to the acknowledgment in writing, were not fulfilled and the suit was barred. (MUKHERJEA J.)

Santlal v. *Kamala Prasad*, 1951 SC 477 : 65 LW 5 : 1952 SCR 116 : 1951 SCJ 768 : 7 DLR SC 83 : BLR 1952 SC 22 : 1952 ALJ 46 : 1952 AWR 118 : 1951 MWN 888 : 30 Pat 1210.

S. 22—Mortgage suit by Manager of joint family.

It must depend upon the circumstances of each case whether a suit is instituted by a Manager of a Hindu joint family in his personal capacity or as representing the family.

Where the circumstances are such that a mortgage suit must be regarded as instituted by the plaintiff in his capacity as manager who must be deemed to represent all the members of his branch, males and females, addition of a female member of the branch to which the plaintiff belongs will only mean the setting out the name of such a person *eo nominee*. Where such a female member is not a necessary party but only proper party, failure to join such a person will not affect the maintainability of the suit nor will it invite the application of section 22. (SHAH J.)

Devidas v. *Srishailappa*, 1961 SC 1277.

S. 23—act amounting to ouster.

Where the wrongful act complained of amounts to ouster, the resulting injury to the right is complete at the date of the ouster and S. 23 cannot apply in such a case. (GAJENDRAGADKAR J.)

Balkrishna Savalram v. *Shree Dhyaneswar Maharaj Sansthan*, 1959 Supp 2 SCR 476 : 1959 SC 798 : 1960 SCJ 1203 : 1960 (2) MLJ 87 : 1960 (2) Andh WR 87 : 1960 (1) SCA 104.

FIRST SCHEDULE

First Division : Suits.

Article 12 [To set aside.....a sale in execution of a decree of a civil court..... —one year— When the sale is confirmed.....]

Applicability.

In execution of a decree for money, after the judgment-debtor's death his brother was substituted as his legal representative and a sale took place. In a subsequent suit by the true legal respresentative of the judgment-debtor for redemption of a mortgage, it was contended by the defendant that the suit was barred under Art. 12.

Held, the plaintiff was not in any way affected by the execution sale and it was not necessary for her to sue for setting aside the sale. She was entitled to ignore the execution proceedings. The executing Court had not been invited to determine any controversy as between the legal representative who was impleaded and the true legal representative. The property had been sold as that of the substituted judgment-debtor and the money-sale passed only the right, title and interest of the substituted judgment-debtor, if it had any effect at all. Hence Art. 12 had no application to the facts of the case.

27 Ind. App. 216 Distinguished. (B. P. SINHA J.)

Nani Bai v. *Gita Bai*, 1958 SC 706 : 1959 SCA 173 : 1958 SCJ 925 : 1959 SCR 479 : 61 Bom LR 523.

Art. 30 [Against a carrier for compensation for losing or injuring goods
—one year—
when the loss.....occurs.]

Starting point—Burden of proof.

The burden is upon the defendant to establish that the loss occurred beyond one year from the date of the suit in order to non-suit the plaintiff on the ground of limitation. (SUBBA RAO J.)

Union of India v. *Amarsingh*, 1960 SCJ 543 : 1960 SC 233 : 1960 (2) SCR 95 : (1960) 1 Punj 536.

Art. 44 [By a ward who has attained majority to set aside a transfer of property by his guardian
—three years—
when the ward attains majority.]

Mutation proceedings.

When the recitals in mutation proceedings do not purport to be based on any transfer or relinquishment by the guardian on behalf of a minor, Art. 44 has no application. (JAGANNADHADAS J.)

Wali Singh v. *Sohan Singh*, 1954 SC 263.

Article 48—Knowledge—burden of proof.

In a suit falling under Art. 48, the plaintiff has to prove that he obtained the knowledge of the defendant's possession of the property within 3 years of the suit. If he proves this, then to succeed in the plea of limitation the defendant has to prove that the fact that the property was in his possession became known to the plaintiff more than three years prior to the suit. That is, the burden of proof as a matter of law and pleading is on the plaintiff who asserts a right and may, having regard to the circumstances of each case, shift to the defendant. It cannot be said that no duty is cast upon the plaintiff even to allege the date when he had knowledge of the defendant's possession of the converted property and that the entire burden of proof is on the defendant.

60 Bom. 848 Approved ; (1934) 13 Patna 752 Disapproved. (SUBBA RAO J.)

K. S. Nanji and Co. v. *Jatashankar Dossa*, 1961 SC 1474.

Arts. 48 and 49.

An application to rectify the share register of a company *simpliciter* without a prayer for the return of shares or scrips is not governed by these Articles. (S. R. DAS J.)

Sha Mulchand & Co. v. *Jawahar Mills Ltd.*, 1953 SC 98 : 1953 SCJ 68 : 1953 SCR 351 : 1953 (1) MLJ 364 : 1953 MWN 319 : 1953 SCA 987.

Arts. 49 and 120—Suit for partition of moveables.

The expression 'specific moveable property' is apt only to cover a suit wherein a plaintiff can allege that he is entitled to certain specific moveable property and/or of which he is presently entitled to possession in specie and which the defendant has wrongfully taken from him and/or is illegally withholding from him.

A dispute between two brothers in regard, *inter alia*, to certain G.P. notes left by their father was referred to arbitration and an award was passed directing that out of the notes standing in the name of G, one of the brothers, G.P. Notes of a certain value should be endorsed in the name of R, the other. Though a decree was passed in terms of the award it was found to be inexecutable for certain reasons. Subsequently R sued G to transfer GP Notes of the value specified in the award by endorsement and to make them over to him. Particulars of all the GP Notes in the custody of G were given. It was contended that the suit was barred by limitation under Art. 49.

Held (negativing the contention) :

It is now well settled that a suit by an heir against other heirs to recover his share of the moveable estate of a deceased person is not one for specific moveable property wrongfully taken such as is contemplated by Art. 49 but is governed by Art. 120.

The giving of particulars such as the numbers, value, date of issue, etc., of the GP Notes in the plaint will not make the suit one for recovery of specific moveable property. Nor does the fact the award decree declared the rights of parties make any difference. Originally the parties were entitled as coparceners to the GP Notes and after the award decree as tenants-in-common. Therefore until actual partition of the notes, G, who held the custody of them could not be said to have taken them wrongfully or that his possession be said to be or to have become unlawful and to the present situation the *termius a quo* specified in the third column of Art. 49 can have no application. The suit was nothing but a suit for partition of moveable properties and was governed by Art. 120.

20 Ind. App. 155 Applied ; 12 Cal. WN 1010 Distinguished.

(S. R. DAS C. J.)

Raghunath Das v. *Gokal Chand*, 1958 SC 827 : 1958 SCA 945 : 1959 SCR 811 : 1958 SCJ 1067 : (1958) Punj 2093.

Art. 60 [For money deposited under an agreement that it shall be payable on demand..... —three years— when the demand is made.]

Deposit coupled with an agreement to pay—construction.

Whether a transaction is a transaction of loan or deposit does not depend merely on the terms of the document but has got to be judged from the intention of the parties and all the circumstances of the case. Even though a transaction is a transaction of deposit, the deposit can be coupled with an agreement that it will be payable on demand. Such an agreement can be express or implied and if an express agreement in that behalf is recorded in the document, the transaction of deposit cannot be thereby converted into a transaction of loan and the words "we shall pay the said sum" cannot convert the document into a promissory note. The promise to pay will be involved in a promissory note as well as in a deposit within the meaning of Art 60.

(BHAGWATI J.)

Annamalai Chettiar v. *Veerappa Chettiar*, 1956 SC 12.

Deposit Receipt—when payable.

Where a deposit receipt issued by a company for monies received for a particular period contains on the reverse a note that interest will cease on due date, that will be sufficient to establish that the amount due at the foot of the deposit receipt becomes due and payable on the due date mentioned therein and limitation commences to run on that date for a suit for recovery of the sum due thereunder. There will be no question of the sum being payable at any time thereafter on demand being made in this behalf by the creditor. (BHAGWATI J.)

Kashinath S. Wani v. *New Akot Cotton Ginning and Pressing Co., Ltd.*, 1958 SCR 1331 : 1958 SC 437 : 1958 SCJ 748 : 1958 SCA 211 : 1958 Jab LJ 362 : 1958 (2) MLJ 125 : 1958 (2) An WR 125.

Art. 64 and S. 19—Acknowledgment in account book.

Where in a suit on accounts an acknowledgment, which ran thus : "After adjusting the accounts Rs. 34,000 found correct payable," was made and signed by the defendant in the plaintiff's ledger in which earlier mutual accounts were entered.

Held, the suit was not based merely on the acknowledgment but was based on the mutual dealings and was clearly maintainable.

57 All. 434 Overruled ; Case law discussed. (MAHAJAN J.)

Hiralal v. *Badkulal*, 1953 SC 225 : 1953 SCR 758 : 1958 SCJ 315 : 1953 SCA 499 : 8 DLR SC 432 : 1953 (1) MLJ 725 : 66 LW 545.

Art. 85 [For the balance due on a mutual open and current account, when there have been reciprocal demands between the parties.

—three years—

the close of the year in which the last item.....is entered in the account ;.....]

Reciprocal demands.

The requirement of reciprocal demands involves transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations.

58 Cal. 649 Approved.

Under a contract for supply of goods the buyer paid an advance and agreed to pay the balance due for the price of goods delivered at the expiry of each month. The buyer made various payments but not month by month nor had paid in full. In a suit for recovery of balance of purchase price due it was contended that the advance paid had made the seller debtor of the buyer, thereby created obligations on the seller towards the buyer and that therefore Art. 85 applied and the suit was within time.

Held (negativing the contention), the advance was paid under the terms of the contract to purchase in discharge of obligations to arise under the contract and did not itself create any obligation on the seller, that the obligation to deliver the goods arose under the contract and not from the payment of the advance alone, that the liability of the seller to refund the advance in case of failure to deliver would have arisen from the contract, that apart from such failure the buyer could not recover the advance, that the case involved no reciprocity of demands and that therefore Art. 85 did not apply and the suit was time-barred.

1954 Jammu and Kashmir 49 Reversed. (SARKAR J.)

Hindustan Forest Company v. *Lalchand*, 1960 SCJ 41 : 1959 SC 1349 : 1960 (1) SCR 563 : (1959) Punj 1835.

Art. 116 [For compensation for breach of contract in writing registered.
—six years—
when.....limitation would begin to run against a suit .....on a similar contract not registered.]

Personal covenant in invalid mortgage deed.

A suit to enforce the personal covenant contained in a registered mortgage which is found to be invalid (due to want of proper attestation, for instance) is governed by Art. 116. The fact that in such cases the plaintiff frames the suit as one to enforce a charge will not give him an extended period of limitation for obtaining a personal decree against a debtor. (MUKHERJEA J.)

Santlal v. *Kamala Prasad*, 1951 SC 477 : 65 LW 5 : 1952 SCR 116 : 1951 SCJ 768 : 7 DLR SC 83 : BLR 1952 SC 22 : 1952 ALJ 46 : 1952 AWR 118 : 1951 MWN 888 : 30 Pat 1210.

Art. 120 [Suit for which no period of limitation is provided elsewhere in this schedule
—six years—
when the right to sue accrues.]

Right to sue.

The right to sue accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel the plaintiff to sue. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether it effectively invades or jeopardizes the said right. (SUBBA RAO J.)

Rukhma Bai v. *Laxminarayanan*, 1960 SC 335 : 1960 (2) SCR 253 : 1960 SCJ 433 : 1960 (1) SCA 624.

The management of a religious institution was vested in certain trustees. Four families were, by tradition, entitled in turn to officiate at certain ceremonies in the institution and also to a share in the surplus income which was distributed by the trustees amongst the four families. After the death of the leading member of one of the families his heirs brought a suit for a declaration that they were entitled to perform the ceremonies and receive the share of income according to their turn and for an injunction restraining the other families from interfering with the exercise of their right in that behalf.

Held, such a suit was governed by Art. 120 and as the trustees had never denied nor were interested to deny the right of the plaintiffs, mere denial by the other families of the rights of the plaintiffs would not set the period of limitation running against the plaintiffs. (SHAH J.)

Mohammed Yunus v. *Syed Unnissa*, 1961 SC 808.

Starting point.

Certain persons whose suits claiming rights of hereditary ownership of a temple had been dismissed took forcible possession of the temple. The trustees appointed by the Government sued them under S. 9 Specific Relief Act for possession. They pleaded in defence their hereditary right as *pujaris* or worshippers but the suit was decreed and they were dispossessed. Subsequently they sued for possession of the office of hereditary *pujaris*, more than 6 years after the dispossession in pursuance of the decree in the trustees' suit.

Held, if not the plaint in that suit at least the decree effectively threatened their rights as hereditary worshippers and their cause of action arose at that time. As there was no continuing cause of action in the circumstances, the suit was barred under Art. 120. (GAJENDRAGADKAR J.)

Balkrishna Savalram v. *Shree Dhyaneswar Maharaj Sansthan*, 1959 Supp 2 SCR 476 : 1959 SC 798 : 1960 SCJ 1203 : 1960 (2) MLJ 87 : 1960 (2) Andh WR 87 : 1960 (1) SCA 104.

Art. 124 [For possession of an hereditary office
—twelve years—
when the defendant takes possession of the office adversely to the plaintiff.....]

Applicability.

The suit intended to be covered by this Article is a suit by a plaintiff who claims the office from a defendant who is in adverse possession of the office himself.

Thus a suit by persons claiming hereditary rights as worshippers against trustees of the institution who claim to have validly terminated the services of some of the predecessors-in-interest of the plaintiffs and appointed others to the said office of *pujaris* or worshippers, does not fall under Art. 124 but only under Art. 120. (GAJENDRAGADKAR J.)

Balkrishna Savalram v. *Shree Dhyaneswar Maharaj Sansthan*, 1959 Supp 2 SCR 476 : 1959 SC 798 : 1960 SCJ 1203 : 1960 (2) MLJ 87 : 1960 (2) Andh WR 87 : 1960 (1) SCA 104.

Hereditary office—what is.

Article 124 relates to a hereditary office and this means that the office goes from one person to another solely by the reason of the latter being an heir to the former. (MUKHERJEA J.)

Kalipada Chakraborti, v. *Palani Bala Devi*, 1953 SC 125 : 1953 SCR 503 : 1953 SCJ 209 : 1953 SCA 171 : 8 DLR SC 228 : 91 CLJ 252 : 1953 (1) MLJ 597 : 66 LW 524.

Arts. 124 and 141—female shebait.

There can be no doubt that there is an element in the shebaiti right which has the legal characteristics of property. But shebaitship is property of a peculiar and anomalous character and it is difficult to say that it comes under the category of immovable property as it is known in law. Art. 141 refers expressly to immoveable property and not to property in the general sense of the word. On the other hand it is quite settled that a shebaiti right is a hereditary office and as such comes within the express language of Art. 124.

When there is a specific article covering the case it is not proper to apply another article the applicability of which is not free from doubt.

Hence a suit by a person claiming as reversioner to the last male holder for possession of a share of a shebaiti right from the alienee from a female heir is governed by Article 124 and not Article 141.

To defeat the title under Art. 124 it is necessary to establish that the defendant had taken possession of the office adversely to the plaintiff or somebody from or through whom the plaintiff derives his title, more than 12 years prior to the institution of the suit. As the Hindu Law of Inheritance applies in the case of succession to shebaitship also and the plaintiff cannot be said to derive his title from the female shebait, time will run from the date of death of the female holder.

27 Ind. App. 69 Applied ; 54 CWN 960 Reversed ; 28 Mad. 197 and 6 CLJ 621 Overruled. (MUKHERJEA J.)

Kalipada Chakraborti v. *Palani Bala Devi*, (*ibid.*)

Arts. 134 and 148—Applicability.

In order to attract the operation of Art. 134 the defendant has got affirmatively to prove that the mortgagee or his successor-in-interest has transferred a larger interest than justified by the mortgage. If there is no such proof then the shorter period under Art. 134 will not be available to the defendant in a suit for possession after redemption and the only other article which will apply will be Art. 148.

(SINHA J.)

Nani Bai v. *Gita Bai*, 1958 SC 706 : 1959 SCA 173 : 1958 SCJ 925 : 1959 SCR 479 : 61 Bom LR 523.

Art. 140 [By a remainderman or reversioner.....for possession.....
—twelve years—
when his estate falls into possession.]

Applicability.

Art. 140 relates to a suit by a remainderman or reversioner in the technical sense of the English lawyers. Lest there should be confusion if the expression "reversioner" is used with reference to the estate of a Hindu or Mohammadan female heir, the Legislature deliberately used other words in Art. 141.

(MUKHERJEA J.)

Kalipada Chakraborti v. *Palani Bala Devi*, 1953 SC 125 : 1953 SCR 503 : 1953 SCJ 209 : 1953 SCA 171 : 91 CLJ 252 : 1953 (1) MLJ 597 : 66 LW 524 : 8 DLR SC 228.

Art. 141 [Like suit by Hindu.....entitled to.....property on the death of a Hindu.....female.....
—Twelve years—
when the female dies.]

It is now perfectly well settled that except where a decree has been obtained fairly and properly and without fraud and collusion against a Hindu female heir in respect to a property held by her as a limited owner, the cause of action for a suit by a reversioner to recover such property either against an alienee from the female heir or a trespasser who held adversely to her accrues only on the death of the female heir.

Case Law discussed. (MUKHERJEA J.)

Kalipada Chakraborti v. *Palani Bala Devi*, 1953 SC 125 : 1953 SCR 503 : 1953 SCJ 209 : 1953 SCA 171 : 91 CLJ 252 : 1953 (1) MLJ 597 : 66 LW 524 : 8 DLR SC 228.

Art. 149—whether discriminatory.

The provision contained in the article prescribing a 60 year period of limitation for suits by the Government is not unconstitutional as contravening the equal protection of laws guaranteed by Art 14 of the Constitution.

1956 Ajmer 10 Approved. (RAJAGOPALA AYYANGAR J.)

Nav Ratanmal v. *State of Rajasthan*, 1961 SC 1704.

Art. 165 [(Application) under the C. P. Code by a person dispossessed.....
and disputing the right of the decree-holder or purchaser.....in execution.....
to be put in possession.....
—thirty days—
the date of the dispossession.]

Applicability to applications by judgment-debtors.

Art. 165 applies only to applications for being restored to possession by persons other than the judgment-debtors as under O. 21 R. 100 C.P.C. An application by the judgment-debtor claiming relief on the ground that his properties had been erroneously taken in execution of the decree is not governed by it.

38 All. 339, 42 Mad 753 (FB), 46 Bom. 1031 and 1923 Cal. 287 Approved.
(VENKATARAMA IYER J.)

Merla Ramanna v. *Nallappa Raju*, 1955 (2) SCR 938 : 1956 SC 87 : 1956 SCJ 101 : 1956 SCA 33 : 69 LW 875 : 1956 (1) MLJ 71.

Art. 166 [(Application) under the same Code to set aside a sale in execution..... including.....by a judgment-debtor.....
—thirty days—
the date of the sale.]

Void execution sale.

Art. 166 applies only when the sale is one which has to be set aside under the law, as for example, under Order 21 Rules 89, 90 and 91, C.P.C. It has no application when the sale is inoperative and void.

When a sale in execution is void and inoperative (e.g., a sale in execution of a sub-mortgage decree, of not the mortgage right but the property which is the subject matter of the original mortgage itself) an application by the judgment-debtor to have it declared void and for appropriate reliefs is governed only by Art. 181 and not Art. 166.

43 Mad 313, 47 Mad 288 (FB), (1938) 1 Cal. 280, 1937 Rang. 126 Approved.
(VENKATARAMA IYER J.)

Merla Ramanna v. *Nallappa Raju*, 1955 (2) SCR 938 : 1956 SC 87 : 1956 SCJ 101 : 1956 SCA 33 : 69 LW 875 : 1956 (1) MLJ 71.

Art. 178 [(Application) for the filing in Court of an award
—ninety days—
the date of service of the notice of the making of the award.]

Whether applies to arbitrators.

Article 178 applies to applications made by the parties and not to the filing of the award by the arbitrators. (KAPUR J.)

Champalal v. *Samarath Bai*, 1960 SC 629 : 1960 SCJ 969 : 1960 (2) SCR 810 : 1960 MPC 294.

Art. 181 [Application for which no period.....is provided elsewhere in this schedule or by section 48 C.P.C.
—three years—
when the right to apply accrues.]

Applications not under the C.P. Code—whether Article applies.

The article has been, by a long series of decisions of most Hight Courts, held to govern only applications under the Code of Civil Procedure. The long catena of decisions may well be said to have as it were, added the words "under the Code" in the first column of the Article. The argument that the reason for holding that Art. 181 applies only to applications under the Civil Procedure Code was the fact that all the articles in the third division of the Schedule to the Limitation Act

originally related to the Civil Procedure Code and that, that reason being no longer available after the introduction of the present Articles 158 and 178 relating to the Arbitration Act, the subsequent amendment of Articles 158 and 178 must necessarily and automatically have the effect of altering the long acquired meaning of Art. 181 did not appear quite convincing to the Supreme Court without further argument. (The matter was not pursued further by S. R. Das J. since on facts it was held that even if Art. 181 did apply the application in question, viz., an application under S. 38, Companies Act, 1913, for rectification of a Company's share register, was in time).

See *Sha Mulchand & Co.* v. *Jawahar Mills Ltd.*, 1953 SC 98 : 1953 SCJ 68 : 1953 SCR 351 : 1951 (1) MLJ 364 : 1953 MWN 319 : 1953 SCA 987.

Starting point.

An application by a party to a suit to recover possession of properties which had been taken delivery of under a void execution sale will be in time under Art. 181, if it is filed within three years of his dispossession.

1930 Mad. 12 Approved. (Venkatarama Iyer J.)

Merla Ramanna v. *Nallappa Raju*, 1955 (2) SCR 938 : 1956 SC 87 : 1956 SCJ 101 : 1956 SCA 33 : 69 LW 875 : 1956 (1) MLJ 71.

Art. 182 [(Application) for the execution of a decree or order of a Civil Court..... —three years, or where a certified copy..... has been registered, six years—

(1) The date of the decree or order, or

(2) (where there has been an appeal) the date of the final decree.....of the appellate Court.....or

(3) (where there has been a review of judgment) the date of the decision passed on the review, or

(4) (where the decree has been amended) the date of amendment, or,

(5).....the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take some step-in-aid of execution..... .....]

Appeal in collateral proceeding.

An appeal against an order in a collateral proceeding having no immediate or direct connection with the decree under execution does not give a fresh starting point.

An application by the judgment-debtor to reopen under S. 36 of the Bengal Moneylenders' Act, a preliminary mortgage decree was dismissed for default and a final decree was passed. The defendant filed an application under Order 9 Rule 9 C.P.C. which was dismissed. He preferred an appeal which was also dismissed. The decree-holder then applied for execution of the final decree more than three years from the date of the final decree but within three years of the dismissal of the appeal.

Held, the application for execution was barred by limitation.

(Fazl Ali J.)

Bhawanipore Banking Corporation v. *Gourishankar*, 1950 SCR 25 : 1950 SC 6 : 1950 SCJ 171 : 1950 RLW 115 : 5 DLR (SC) 10.

Clause (3)—Applicability.

For the application of this sub-clause it must be shown that the Court had undertaken to review the decree or order under execution and that there had been a decision on the review. (Fazl Ali J.)

Bhawanipore Banking Corporation v. *Gourishankar*, (*Ibid.*)

Clause (5)—application in accordance with law.

One V assigned a decree in his favour to one M. That assignment was relied on as an act of insolvency and V was adjudicated an insolvent on a creditor's application. Subsequently the assignment was annulled under S. 54 of the Provincial Insolvency Act, 1920. In the meanwhile M, the assignee had filed an application for excution of the decree but the application was dismissed for non-prosecution. After the annulment of the assignment, the Official Receiver applied for execution, relying on the application by M as a step-in-aid. It was contended that (1) as the assignment in M's favour had been annulled, M was to be deemed never to have been the owner of the decree and therefore M's application was incompetent, and (ii) the Official Receiver did not claim under M but had actually claimed against M, and that therefore the application for execution by the Official Receiver was barred under Art. 182.

Held (negativing the contentions),

The transfer liable to be annulled under S. 54 of the Provincial Insolvency Act remains valid till it is set aside. Even though the transfer is the act of insolvency on which the order of adjudication is based, the transferee has all the rights in the property transferred, till then and therefore the exercise of such rights (i.e., the application to execute the decree by M) by the transferee will be fully in accordance with law. So too, Art. 182 does not say that no advantage can be taken of a previous application unless it had been made by a person under whom the applicant in the later application, alleged to be barred, claims. Therefore Art. 182 (5) applied to the case and the application by the Official Receiver was in time. (SARKAR J.)

Ramaswami Chettiar v. *Official Receiver*, 1960 SCJ 128 : 1960 SC 70 : 1960 (1) SCR 616 : 1960 (1) MLJ 41 : 1960 (1) Andh WR 41.

Effect of fraud.

It is true that Arts. 181 and 182, Limitation Act and section 48 C.P.C. should be read together but they are independent or parallel provisions different in their scope and object. Fraud under S. 48 (2) C.P.C. extends the 12 years period by a further period of similar duration but the necessity to take steps under Art. 182 to keep the decree alive is not thereby obviated. The only circumstance that could relieve the decree-holder of this obligation is the existence of fraud under S. 18 Limitation Act.

(1939) Mad. 622 Approved.

The argument that the effect of S. 48 (2) is not merely to make the 12 years' period start from the discovery of fraud but also to give a fresh starting point for the schedule to the Limitation Act is unsound.

By the enactment of S. 18 Limitation Act, the legislature has distinctly contemplated that for the Limitation Act the starting point is changed on the ground of fraud only when the knowledge of the right to apply is prevented by the fraud of the judgment-debtor. If a man is prevented from applying because of the fraud of the debtor he is not necessarily prevented from knowing his right to apply. When the decree-holder has the knowledge of his right to apply if the judgment-debtor prevents him from knowing the existence of certain properties against which the decree could be enforced, the case clearly is not covered by the words of S. 18 Limitation Act.

In the case of fraud of the judgment-debtor, provision is made in S. 48 (2) C.P.C. to enlarge the 12 year period prescribed by S. 48 and for defeating the plea of limitation under the Limitation Act in the case of fraud of the judgment-debtor provision is found in S. 18. If the particular case of fraud set up and proved is not covered by S. 18, there is no protection against the same in the Limitation Act. Read in that way, these two provisions are neither conflicting nor overlapping.

Concealing from a person the knowledge of his right to apply for execution of a decree is undoubtedly different from preventing him from exercising his right of which he has knowledge. S. 18 Limitation Act postulates the former alternative. To read it as referring to an application for execution to proceed against a particular property would be destructive of the oneness of the decree and would lead to multiplicity of periods of limitation.

An execution application was presented more than 12 years after the date of the decree and more than 3 years from the date of the last order on the previous application. It was contended on behalf of the decree-holder that as the judgment-debtor, who had purchased a newspaper, opened current accounts and operated on them, gave the names of others as the owner of the paper and printer and publisher and declared in insolvency proceedings to be an agriculturist dependent on the income from family lands for maintenance and thus by suppressing his ownership of the newspaper prevented execution against that property, a fresh starting point of limitation would spring up from the date of the discovery of the fraud and that the execution application was within time.

Held, his conduct was fraudulent within the meaning of S. 48 (2) C.P.C. but the case not being covered by S. 18, Limitation Act, the application for execution was barred by limitation under Art. 182.

Yeshwant v. *Walchand*, 1951 SC 16 : 1950 SCR 852 : 1951 SCJ 19 : 6 DLR SC 73 : 1951 ALJ 8 : 64 LW 353 : 1951 MWN 286 : 1951 RLW 193 : BLR 1951 SC 15 : 2 Raj LW 193 : 55 Bom LR 486.

LOST GRANT—**Presumption.**

The circumstances and conditions under which a presumption of lost grant could be made are well settled. When a person was found in possession and enjoyment of land for a considerable period of time under an assertion of a title without challenge, courts in England were inclined to ascribe a legal origin to such possession, and when on the facts a title by prescription could not be sustained, it was held that a presumption could be made that the possession was referable to a grant by the owner entitled to the land, but that such grant had been lost. It was a presumption made for securing ancient and continued possession which could not otherwise be reasonably accounted for. But the courts were not bound to raise it, if the facts in evidence went against it. The presumption was not made if there was any legal impediment to the making of it or if there was no person capable of making a grant or if the grant would have been illegal and beyond the powers of the grantor. (VENKATARAMA IYER J.)

Manohar Das Mohanta v. *Charu Chandra Pal*, 1955 SCR 1168 : 1955 SC 228 : 1955 SCA 156 : 1955 SCJ 114.

Perpetual lease.

It is beyond the powers of the manager of a religious institution to grant a perpetual lease binding the institution for all times to a fixed rent, unless there is a compelling necessity or benefit.

44 Ind. App. 147 Followed.

When there is neither premium paid nor rent reserved but a Lakheraj grant unsupported by any consideration, no presumption of a lost grant can be made.

1951 Cal. 385 Reversed. (VENKATARAMA IYER J.)

Manohar Das Mohanta v. *Charu Chandra Pal*, (*ibid.*).

(MADHYA BHARAT) UNITED STATE OF GWALIOR, INDORE AND MALWA (MADHYA BHARAT) HIGH COURT OF JUDICATURE ACT, 1949,—**Sections 2 (b) and 25—retrospective effect.**

The words "arising in the said States" occurring in S. 2 (b) do not refer to proceedings arising in a princely State but in the area of an erstwhile princely State subsequently included in the United State of Madhya Bharat.

A suit was disposed of by a single Judge of the Indore High Court before the Ruler of Indore made over its administration to the United State of Madhya Bharat. The aggrieved party preferred an appeal to the Divisional Bench of the High Court of the United State which was decided before the coming into force of the Act. An appeal was thereafter preferred to the Full Bench of the Madhya Bharat High Court and a preliminary objection was raised that the appeal was incompetent.

Held (overruling the objection),

The language of S. 2 (b) clearly applies S. 25 to a proceeding which was pending on a date before the Act came into force and therefore gives a right of appeal from a judgment of a Divisional Bench passed in that proceeding whenever it may have been passed, that is to say, whether it was passed before the Act or after it, and there is nothing in the section to indicate that the legislature intended the retrospective operation of S. 25 to be confined to those pending cases which had not terminated before the Act had come into force and therefore the appeal was maintainable.

1951 Madh B 1 (FB) Reversed. (SARKAR J.)

Gulabchand v. *Kudilal*, 1958 SC 554 : 1959 SCJ 173 : 1958 MPLJ 632.

MADHYA PRADESH AGRICULTURAL CATTLE PRESERVATION ACT, 1959, **Sections 4(2) (a), 4 (3) and 5 and Rule 3—validity.**

S. 4 (2) (a) as drafted is bad ; S. 4 (3) in so far as it confers a right of appeal to any person aggrieved, even a member of the public, and S. 5 relating to the time of slaughter impose unreasonable and disproportionate restrictions on the fundamental right guaranteed by Art. 19 of the Constitution. These provisions are therefore void. Rule 5 of the M.P. Agricultural Cattle Preservation Rules which reproduces the provisions of S. 4 (2) (a) also falls with it. (S. K. DAS J.)

Abdul Hakim Quaraishi v. *State of Bihar*, 1961 SC 448.

MADRAS COURT-FEES AND SUITS VALUATION ACT, 1955, **S. 12 (2) —whether revision lies at the instance of the defendant.**

Whether proper court fee is paid on a plaint is primarily a question between the plaintiff and the State and S. 12 (2) only enables a defendant to raise a contention as to the proper court fee payable on plaint and to assist the Court in arriving at a just decision on that question. There is no provision in the Act or any other statute which enables the defendant to move the High Court in revision against the decision of the Court of first instance on the matter of court fee payable on a plaint where no question of jurisdiction is involved. The provisions of the Act do not arm the defendant with a weapon of technicality to obstruct the progress of the suit by approaching the High Court. Even a defendant who may honestly believe that proper court fee has not been paid by the plaintiff has no right to move the superior Courts by way of appeal or revision against the order adjudging payment of court fee payable on a plaint.

38 Mys LJ 534 Disapproved. (SHAH J.)

Rathnavarama Raja v. *Smt. Vimla*, 1961 SC 1299.

MADRAS HEREDITARY VILLAGE OFFICES ACT, 1895, **S. 6 (1)—Validity.**

The office of Village Munsif under the Act is an office under the State and there is nothing in the nature of the office which takes it out of Art. 16 Cls. (1) and (2) of the Constitution. Therefore S. 6 (1) discriminates on the ground of descent only and is in contravention of Art 16 (2) and is void.

On the formation of a new village and creation of a new office of Village Munsif, the Revenue Authorities appointed one C on the ground that he, as the nearest heir of the last holder of the office of Village Munsif which was abolished, was entitled to preference, under S. 6 (1) over another person. The latter filed a writ petition before the Supreme Court.

Held (allowing the petition), the application of the petitioner should be considered on merits by the authorities on the footing that S. 6 (1) is void.

(S. K. DAS J.)

G. Dasaratha Rama Rao v. *State of Andhra Pradesh*, 1961 SC 564.

MADRAS HINDU RELIGIOUS & CHARITABLE ENDOWMENTS ACT, 1951—**Validity of certain provisions.**

Sections 21, 30 (2), 31, 55, 56 and 63 to 69 are invalid as they conflict with the fundamental rights of Mathadipathis. S. 76 (1) is void as being beyond the legislative competence of the State Legislature.

1952 Mad. 613 Affirmed. (MUKHERJEA J.)

Commissioner H. R. E. Madras v. *Lakshindra Thirtha Swamiar*, 1954 SC 282 : 1954 SCR 1005 : 1954 SC 335 : 1954 SCA 415 : 1954 (1) MLJ 596 : 67 LW 1220 : 1954 MWN 363 : 20 CLT 250 : 1954 VLJ SC 1.

MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, 1927, **S. 44 B (1)—whether applies to personal inams burdened with service.**

S. 44 B (1) is confined only to inams directly granted to the temple or service inams for the purposes of a temple or math or inams the whole of the income of which is meant for charity and does not include personal inams burdened with service to a temple or a math. Such inams would continue to be dealt with under Madras Revenue Board's Standing Order 54 Class (B).

1954 Mad. 795 Affirmed. (WANCHOO J.)

Bheemsena Rao v. *Sirigiri Yella Reddi*, 1961 SC 1350.

S. 73—Equitable reliefs.

In a suit for ejectment on proof of title by the executive officer appointed by the Government, equitable considerations are entirely out of place though in a proceeding for the framing of a scheme relating to a temple it may be permissible to take into account the claims, moral if not legal, of the Archakas and to make some provision for protecting their rights. (S. R. DAS J.)

Satyanarayana v. *Konduru Venkatappayya*, 1953 SC 195 : 1953 SCR 1001 : 1953 SCJ 283 : 8 DLR SC 274 : 1953 (1) MLJ 693 : 66 LW 536.

MADRAS MARUMAKKATHAYAM (REMOVAL OF DOUBTS) ACT, 1955—**validity.**

The Act is expropriatory in character and is directly hit by Art. 19 (1) (f) and is not saved by cl. (5) of Art. 19 and is void. Art. 31A of the Constitution canton

be invoked in support of its validity since the Act does not effectuate any agrarian reform and regulate rights *inter se* between the landlords and tenants.
(SUBBA RAO J.)

Kochunni v. *States of Madras and Kerala*, 1960 SC 1080 : 1960 Ker LT (SC) 31 : 1960 Ker LJ 1077.

MADRAS REVENUE RECOVERY ACT 1864, **S. 48—Validity.**

The section does not violate Arts. 14, 19, 21 and 22 of the Constitution.

1954 Mad. 1091 Reversed. (IMAM J.)

Collector of Malabar v. *Erimmal Ebrahim Hajee*, 1957 SC 688 : 1957 SCJ 640 : (1957) 32 ITR 124 : 1957 Cr LJ 1030 : 1957 (2) MLJ 115 : 1957 KLT 1010 : 1957 (2) An WR 115.

Procedure.

There is nothing in the section requiring the collector to give the defaulter an opportunity of being heard before arresting him. But the collector must have reason to believe that the defaulter is wilfully withholding or is guilty of fraudulent conduct in order to evade payment. Therefore he must have material upon which he bases his belief and a Court may look into it in appropriate cases to find out if the conditions laid down in the section have been satisfied or not. (IMAM J.)

Collector of Malabar v. *Erimmal Ebrahim Hajee* (*ibid.*)

Release on payment.

One of the conditions precedent to action under the section is the existence of arrears of revenue. On payment of the arrears the condition no longer exists and the debtor must clearly be entitled to release from arrest. (IMAM J.)

Collector of Malabar v. *Erimmal Ebrahim Hajee* (*ibid.*)

MARWAR LAND REVENUE ACT, 1949, **Ss. 81 to 86—validity.**

The scheme embodied in Sections 81 to 86 of the Act does not transgress any of the constitutional limitations and is valid. (VENKATARAMA IYER J.)

Kishan Singh v. *State of Rajasthan*, 1955 (2) SCR 531 : 1955 SC 795 : 1956 SCA 402 : 1956 SCJ 14 : 1955 (6) STC 446.

S. 86—discretion, whether arbitrary.

The power conferred on the Settlement Officer to give retrospective operation to the rent rates is not unreasonable as being left to his uncontrolled discretion, for discretion which is wide is not necessarily arbitrary. (VENKATARAMA IYER J.)

Kishan Singh v. *State of Rajasthan*, (*ibid.*)

MESNE PROFITS—**delay in ascertainment.**

Where the plaintiff was not prompt in getting the mesne profits ascertained and there was a long delay the Supreme Court reduced the rate of interest on mesne profits allowed by the Court below from 6 to 4 per cent.

Bhupendra Narain Singh Bahadur v. *Bahadur Singh*, 1952 SC 201 : 1952 SCR 782 : 1952 SCJ 269 : BLR 1952 SC 235 : 7 DLR SC 348 : 1953 SCA 143.

Setting aside Hindu widow's alienation.

A reversioner's suit for possession of property alienated by a Hindu widow is governed by Art. 141 Limitation Act and it is not necessary that the transfer should be set aside before a decree for possession is made. The decree in such a suit must be on the basis that the possession of the transferee was unlawful ever since the death of the widow and mesne profits from the date of the widow's death can be granted.

34 Cal. 329 (P.C.) Ref. to.

There is no rule of law that no mesne profits can be allowed in a case where the alienation cannot be described as absolutely void. In 35 Ind. App. 48 and 59 Ind. App. 147 mesne profits were allowed in transactions which were only voidable.

There is a difference between the alienee from a Hindu widow and the transferee of joint property from a Mitakshara father. A son is bound to sue to set aside the alienation within the period prescribed by Art. 126 of the Limitation Act and it is only on the alienation being set aside that he will be entitled to recover possession of the property. (MUKHERJEA J.)

Mumma Reddi v. *Durairaja*, 1951 SCR 655 : 1952 SC 109 : 1952 SCJ 192 : 7 DLR SC 307 : BLR 1952 SC 142 : 1952 (1) MLJ 746 : 65 LW 519.

MORTGAGE—**Right of Mortgagor in possession to grant lease (before the insertion of Section 65-A in the Transfer of Property Act by the Amending Act of 1929).**

Though a mortgagor may assign the mortgaged premises the assignee can only take subject to the encumbrances and if the property is sold or foreclosed by the mortgagee, any interest which the mortgagor may have created since the mortgage will be destroyed. It does not however follow that a lessee from a mortgagor acquires no interest whatever in the property demised to him. The lessee does acquire an interest in the equity of redemption and can claim a right to redeem on that footing. It does not follow either that the interest which the lessee has thus acquired is operative against the mortgagee. The true position is that the mortgagor in possession may make a lease conformable to usage in the ordinary course of management, e.g., he may create a tenancy from year to year in the case of agricultural lands or from month to month in case of houses. But it is not competent to a mortgagor to grant a lease on unusual terms or to alter the character of the land or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage.

1916 Cal. 870 Disapproved ; 1917 Cal. 222 Approved ; 10 WR 325 (Cal) Explained.

It is for the lessee to establish that the lease in his favour was granted on the usual terms in the ordinary course of management. Such a plea if established—the burden of proof is upon the lessee—would furnish a complete answer to the claim of the mortgagee. Otherwise the lessee will have no defence to an action at the instance of the mortgagee.

In the absence of a plea on behalf of the defendant that the grant of a permanent lease in his favour was a dealing with the mortgaged property in the usual course of management by the mortgagor, *held*, the permanent lease cannot prevail against the mortgagee's representative. (BHAGWATI J.)

Kamakshaya Narayan Singh v. *Chohan Ram*, 1952 SC 401 : 1952 SCJ 553 : 1952 ALJ 710 : 1953 (1) MLJ 12 : 1953 SCR 108 : 8 DLR SC 10 : 1952 SCA 807 : 66 LW 549 : 31 Pat 1020 : 1 BLJ 1.

MOTOR VEHICLES ACT, 1939, **Ch. IV-A—validity.**

Chapter IV-A is not *ultra vires* the powers of Parliament. The provisions of the Chapter do not infringe Art. 14 of the Constitution. (SUBBA RAO J.)

Kondala Rao v. *Andhra Pradesh State Road Transport Corporation*, 1961 SC 82.

S. 96 (2) and (6)—defences open to insurer.

An insurer made a defendant to an action is not entitled to take any defence which is not mentioned in sub-section (2).

1955 Punjab 187 Affirmed. (SARKAR J.)

British India General Insurance Co., Ltd. v. *Capt. Itbar Singh*, 1960 (1) SCR 168 : 1959 SC 1331 : 1960 SCJ 44 : (1959) Punj 1835 : 1960 (1) MLJ 6 : 1960 (1) An WR 6 : 29 Com Cas 60.

MUHAMMADAN LAW—*De facto* **guardian—alienation by.**

Under Muhammadan Law, a person who has charge of the person or the property of the minor without being his legal guardian and who may therefore be conveniently called a *de facto* guardian has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant.

1918 P.C. 11 Referred to.

Where in a deed of settlement a Muhammadan minor was not represented by any legal guardian but by his elder brother it is void irrespective of the benefit resulting to the minor from the transaction.

1938 P.C. 181 Referred to ; 1919 Cal 218 and 1929 Oudh 134 Overruled.

Where the deed of settlement is thus void, it could not be void only *qua* the minor but would be void altogether *qua* all the parties including those who were *sui juris*. (BHAGWATI J.)

Mohd. Amin v. *Vakil Ahmed*, 1952 SC 358 : 1952 SCR 1133 : 1952 SCJ 539 : 1953 (1) MLJ 6 : 8 DLR SC 6 : 1953 SCA 245 : 1953 ALJ 4 : 66 LW 3 : 1 BLJ 25.

Dower—priority.

A Muhammadan widow in possession of her husband's estate in lieu of her claim for unpaid dower with the consent of the other heirs or otherwise is not entitled to priority as against his other unsecured creditors. Her claim constitutes a debt payable *pari passu* with the demands of other creditors and is not a preferential charge on the estate.

Quranic Texts and case law discussed ; 25 Mad. 658 Approved : 1934 All. 168, 1936 All. 600 and 17 Deccan LR 224 Overruled.

Kapore Chand v. *Kidar Nissa Begum*, 1953 SC 413 (Hyderabad Bench).

Marriage—Presumption.

The presumption in favour of a lawful marriage would arise under Muhammadan Law where there was prolonged and continued cohabitation as husband and wife and where there was no insurmountable obstacle to such a marriage, e.g., prohibited relationship between the parties, the woman being the undivorced wife of a husband who was alive and the like.

3 M.I.A. 295 Referred to. (BHAGWATI J.)

Mohd. Amin v. *Vakil Ahmed*, 1952 SC 358 : 1952 SCR 1133 : 1952 SCJ 539 : 1953 (1) MLJ 6 : 8 DLR SC 6 : 1953 SCA 245 : 1953 ALJ 4 : 66 LW 3 : 1 BLJ 25.

Wakf—how created.

A *wakf* normally requires express dedication but if land has been used from time immemorial for a religious purpose, then the land is by user *wakf* although there is no evidence of an express dedication.

Mohammed Shah v. *Fasihuddin Ansari*, 1956 SC 713.

Wakf—Mutawalli making additions.

If the Mutawalli of a *wakf* chooses to build on part of the wakf property in such a way as to integrate the whole into one unit and has not demarcated that portion from the rest then that is bound to be regarded as an accretion to the trust estate.

Mohammed Shah v. *Fasihuddin Ansari*, (*ibid.*)

MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937, **S. 2 (as amended by Madras Act 18 of 1949)—whether retrospective.**

Under the Act as originally framed in questions relating to charities and charitable institutions and charitable and religious endowments, the custom or usage would prevail. But it is expressely stated in the amended Act that in all questions relating to matters specified (including the above-mentioned questions) in cases where the parties are Muslims the "rule of decision" shall be the Muslim personal law. The injunction is one against the court ; it is enjoined to apply the Muslim personal law notwithstanding any custom or usage to the contrary. The intention of the Legislature is clear and the Act applies to all suits and proceedings which were pending on the date when the Act came into force as well to those filed after that date. Though suits which had been finally decided would not be affected by the enactment of the Act, if a suit or proceeding is pending even in appeal on the date when the Act was brought into operation, the law applicable for decision would be the Muslim personal law if the other conditions prescribed by the Act are fulfilled.

1943 Lah 219 Not Approved ; 1953 Mad 445 Affirmed. (SHAH J.)

Mohamad Yunus v. *Syed Unnissa*, 1961 SC 808.

MYSORE SERVICES REGULATIONS, **Arts. 294 and 297.**

Art. 297 is complementary to Art. 294 (a) which gives the Government the power of keeping its servants in service beyond the age of 55 years. Art. 297 allows the Government servant, if the Government wants him in service after 55, to opt for retirement. It does not mean that it is entirely at the option of the Government servant to continue beyond the age of 55 years and that the Government cannot retire him at that age if he does not exercise the option. Hence it is open to the Government to retire the Government servant if it thinks that the person is not efficient to be kept in further service. (WANCHOO J.)

Narasimhachar v. *State of Mysore*, 1960 SC 247 : 1960 (1) SCR 981 : 1960 SCJ 516.

MYSORE TOWN MUNICIPALITIES ACT, 1951, **S. 14 (1) (A) (a) (iii).**

A person who holds office as a non-official Chairman of a Taluk Development Committee drawing only a small sitting fee cannot be said to hold an office of profit within the meaning of the section. (MUKHERJEA J.)

Ravanna Subbanna v. *G. S. Kaggeerappa*, 1954 SC 653.

Native Share and Stock Brokers' Association Rules, Rule 167.

The definition in S. 3 (4) of Bombay Act 8 of 1925 would be wholly irrelevant for determining whether a contract is a forward contract for purposes of R. 167, the decision of which question must depend entirely on the construction of the Rules. The contracts which are regulated by Rules 359 to 363 cannot be forward contracts contemplated by R. 167 and they cannot be held to be void under that rule. (VENKATARAMA IYER J.)

Jugal Kishore v. *Gool Bai Hormusji*, 1955 (2) SCR 857 : 1955 SC 812 : 1956 SCA 499 : 58 Bom LR 486 : 1956 SCJ 64.

NEGOTIABLE INSTRUMENTS ACT, 1881, **S. 7—oral acceptance of hundi.**

There cannot be, apart from any mercantile usage, an oral acceptance of a hundi much less an acceptance by conduct where at least no question of estoppel arises. (VENKATARAMA IYER J.)

Jagjivan Mavji v. *Ranchoddas Meghji*, 1954 SC 554 : 1955 (1) SCR 503 : 1954 SCJ 626 : 1954 SCA 842 : 1954 AWR 499 : 57 Bom LR 17 : 1954 (2) MLJ 202 : 67 LW 1133 : 1954 MWN 767 : 1954 VLJ 72.

S. 26—instruments by companies.

The law in regard to a company's power to issue a negotiable instrument has to be found in the relevant provisions of the Companies Act. A company cannot claim authority to issue a cheque under the first part of S. 26, for the section does not purport to make any provision of substantive or procedural law. (GAJENDRAGADKAR J.)

Oriol Industries Ltd. v. *Bombay Mercantile Bank Ltd.*, 1961 (1) SCJ 563 : 1961 (1) MLJ 163 : 1961 SC 993 : 31 Com Cas 185.

S. 32—liability of drawee—when arises.

The drawee of a negotiable instrument is not liable on it to the payee unless he has accepted it, for it is acceptance that establishes privity on the instrument between the payee and the drawee. (VENKATARAMA IYER J.)

Jagjivan Mavji v. *Ranchoddas Meghji*, 1954 SC 554 : 1955 (1) SCR 503 : 1954 SCJ 626 : 1954 SCA 842 : 1954 AWR 499 : 57 Bom LR 17 : 1954 (2) MLJ 202 : 67 LW 1133 : 1954 MWN 767 : 1954 VLJ 72.

S. 61—presentment by unauthorised person.

In the case of a bill payable at sight both the stages of presentment for acceptance and for payment are rolled up into one. The person who is entitled to present it for acceptance is the one who is entitled to receive the payment under S. 78, viz., the holder of the instrument. Hence where the person who actually presents the bill for payment had no authority to receive the amount on behalf of the holder, there is no valid presentment of the bill by him for acceptance either. (VENKATARAMA IYER J.)

Jagjivan Mavji v. *Ranchoddas Meghji*, (*ibid.*)

S. 118—presumption—burden of proof—how discharged.

When evidence has been adduced on both sides, the question of onus is a material or deciding factor only in exceptional circumstances. Even the onus under S. 118 need not always be discharged by direct evidence adduced by the defendant. Not merely can the Court base its conclusion on the effect of the

evidence taken as a whole but it may also draw inferences (under S. 114 of the Evidence Act) against a party who being in a position to adduce better evidence deliberately abstains from doing so.

(1937) Mad 299 Approved.

For instance, a plaintiff who says that he had sold certain goods to the defendant and that a promissory note was executed by the defendant as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was effected for a particular consideration, should produce the said account books and the defendant certainly cannot be expected to produce the documents. In these circumstances if such a relevant evidence is withheld by the plaintiff, S. 114 of the Evidence Act enables the Court to draw a presumption to the effect that, if produced, the account books would be unfavourable to the plaintiff. This presumption, if raised by the Court, can, under certain circumstances, rebut the presumption of law raised under Sec. 118 of the Negotiable Instruments Act. (SUBBA RAO J.)

Kundan Lal Rallaram v. *Custodian, Ev. Property, Bombay*, 1961 SC 1316.

OATHS ACT 1873, **S. 5, proviso—child witness.**

It is desirable that judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But this opinion can be gathered from the circumstances of the case when there is no formal certificate. (BOSE J.)

Rameshwar v. *State of Rajasthan*, 1952 SC 54 : 1952 SCR 377 : 1952 SCJ 46 : 1952 (1) MLJ 440 : BLR 1952 SC 88 : 1952 Cr LJ 547 : 1952 MWN 150 : 65 LW 351 : 7 DLR SC 87 : 1952 SCA 40 : 1952 MWN (Cr) 26.

S. 13—effect of omission to administer oath.

An omission to administer an oath, even to an adult, affects only the credibility of the witness and not his competency which is dealt with in S. 118 of the Evidence Act. (BOSE J.)

Rameshwar v. *State of Rajasthan*, (*ibid.*)

S. 14—duty of party—witness.

A defendant or even a plaintiff is not bound to go into the witness box, but if either of them chooses to do so, he cannot, after he has taken the oath to make a truthful statement, state anything which is false. If he does, he has committed an offence. It is no defence to say that he was not bound to enter the witness box. (KAPUR J.)

Ranjit Singh v. *State of Pepsu*, 1959 SC 843 : 1959 SCJ 905 : 1959 Sup 2 SCR 727 : 1959 (2) SCA 552 : 1959 MLJ (Cr) 618 : 1959 (2) An WR 121 : 26 Cut LT 576 : 1959 All Cr R 298 : 1959 (2) MLJ 121 : 1959 All WR 371 : (1959) Punj 1709.

ORISSA AGRICULTURAL INCOME-TAX (AMENDMENT) ACT, 1950—**whether colourable legislation.**

It may appear on scrutiny that the real purpose of a legislation is different from what appears on the face of it. But it would be colourable Legislation only if it is shown that the real object is not attainable to it by reason of any constitutional limitation.

Assuming that the Act was introduced with an ulterior purpose, viz., to reduce the compensation payable in respect of estates acquired under the Orissa Estates Abolition Act, still the Act cannot be regarded as a colourable legislation, for under entry 42, List III, Sch. VII of the Constitution the Legislature can adopt any principle of compensation in respect to properties compulsorily acquired. (MUKHERJEA J.)

Gajpati Narayan Deo v. *State of Orissa*, 1954 SCR 1 : 1953 SC 375 : 1954 SCA 1 : 1953 SCJ 592 : (1954) Orissa 351 : 20 CLT 1.

ORISSA HINDU RELIGIOUS ENDOWMENTS ACT, 1939—**Validity.**

Sections 38 and 39 and the proviso to S. 49 are invalid. Sections 11, 14, 28, 47 and 49 are not invalid. (MUKHERJEA J.)

Sri Jagannath Ramanuja Das v. *State of Orissa*, 1954 SC 400 : 1954 SCR 1046 : 1954 SCJ 329 : 1954 SCA 569 : 1954 (1) MLJ 591 : (1954) Orissa 334.

ORISSA HINDU RELIGIOUS ENDOWMENTS ACT, 1952, **S. 42 (1) (b)—Applicability to math.**

A math is a religious institution presided over or managed by a hereditary trustee so as to render S. 42 (1) (b) applicable. (JAGGANADHADAS J.)

Sadashib Prakash v. *State of Orissa*, 1956 SCR 43 : 1956 SC 432 : 1956 SCA 794 : 1956 SCJ 397 : 22 Cut LT 235 : 1956 SCC 478.

Ss. 42 (1) (b), 42 (7) and 44 (2)—validity.

The provisions in the Act relating to framing of schemes are not constitutionally invalid. (JAGANNADHADAS J.)

Sadashib Prakash v. *State of Orissa*, (*ibid.*)

S. 79-A—validity.

S. 79-A is not open to objection on the ground of legislative incompetence. (JAGANNADHDAS J.)

Sadashib Prakash v. *State of Orissa*, (*ibid.*)

ORISSA MUNICIPAL ACT, 1950, **S. 1 (3) & (5).**

S. 1 (5) contemplates the holding of elections under the Act in spite of the fact that the Act had not come into force in a particular area.

S. 1 (3) postpones the commencement of the Act which means that S. 1 (3) came into operation immediately the Governor gave his assent to the Act. S. 1 (5), being a proviso to S. 1 (3) must be regarded to have come into operation along with S. 1 (3). S. 1 (5) of the Act empowered the State Government to hold elections and thereby validated all the preliminary steps taken for the purpose of holding such election, the only reservation made being that even though the election under the Act be held, such election was not to take effect till the Act came into force in the particular area. (BHAGWATI J.)

Sakhawant Ali v. *State of Orissa*, 1955 SCR 1004 : 1955 SC 166 : 1955 SCA 353 : 1955 SCJ 262 : 21 Cut LT 88.

S. 16 (1) (ix)—Validity.

The disqualification prescribed under Sec. 16 (1) (ix) does not violate Art. 19 (1) (g) of the Constitution and does not prevent a person from practising his

profession of law. Even if it be taken as a restriction on his right to practise his profession of law, such restriction would be a reasonable one and well within the ambit of Art. 19 (5) of the Constitution.

There is no fundamental right in any person to stand as a candidate for an election. (BHAGWATI J.)

Sakhawant Ali v. *State of Orissa*, (*ibid.*)

Nor does the classification made by the section violate Article 14 of the Constitution. (BHAGWATI J.)

Sakhawant Ali v. *State of Orissa*, (*ibid.*)

OUDH ESTATES ACT, 1869, **Ss. 13A and 14.**

A *taluqdar* executed a will under which he bequeathed certain properties to his younger son giving him a life-estate followed by a devise in favour of the wife of the younger son. The elder son who succeeded to the estate on the death of the *taluqdar* sued, after the death of the younger son, his widow for possession of the properties bequeathed. It was contended by the plaintiff that as a younger son was one of the persons centemplated by S. 13A, he could, under S. 14, hold the properties subject to the same rule of succession applicable to the *taluqdar* himself ;

Held, (i) though a younger son came within the purview of S. 13A (1), S. 14 did not apply as the disposition by the will did not make him an absolute owner and he was given only a life estate followed by interests created in favour of others ; (ii) it could not also be contended that it was not competent for a *taluqdar* to create any limited interest or future estate provided he did not transgress the rule against perpetuity ; and (iii) the plaintiff had no present right to possession against the defendant who had a life-interest under the will. (MUKHERJEA J.)

Bajrang Bahadur Singh v. *Thakurain Bakhtraj Kuer*, 1953 SCR 232 : 1953 SC 7 : 1952 SCJ 655 : 1953 SCA 369 : 8 DLR SC 71 : 1953 ALJ 49 : 1953 AWR 85 : 1953 (1) MLJ 108 : (1953) 1 All 896.

PARTNERSHIP ACT, 1932, **S. 4—Person—whether includes firms.**

The importing into S. 4 the definition of the word 'person' in S. 3 (42) of the General Clauses Act will be totally repugnant to the subject of the partnership law. As such, a firm is not entitled to enter into a partnership with another firm or Hindu undivided family or individual. (S. K. DAS C. J.)

Dulichand Laxminarayan v. *Commissioner of Income-tax, Nagpur*, 1956 SCR 154 : 1956 SC 354 : 1956 SCA 379 : 1956 SCJ 317 : (1956) 29 ITR 535 : 1956 (1) MLJ 164.

S. 7 and S. 43—implied term as to duration or determination.

The exceptions contemplated by S. 7 to a partnership at will are where there is a provision in the contract for the duration of partnership or for the determination of the partnership. In either of these cases the partnership is not at will. The deviation may be expressly provided for in the contract, but even when there is no express provision, courts have held that the partnership will not be at will if the duration can be implied. The same principle applies if an implied term as to when the partnership will determine may be found in the contract, even if there is no express term that the partnership will determine in certain circumstances.

Halsbury's Laws of England III Edn. Vol. 28, P. 502 Referred to.

Two persons entered into a partnership in order to carry on the business of

Managing Agency of a company. It was contemplated that the management would be carried on in rotation between them in four yearly periods and that the heirs of the partners would also so carry in rotation. It was also provided that either partner may withdraw from the partnership by relinquishing his right of management to the other partner.

Held, the intention obviously was to have a partnership of some duration, though the duration was not expressly fixed in the agreement that the terms clearly suggested that the duration of the partnership would be the same as the managing agency and that even if there was some doubt whether any duration was implied, there could be no doubt that the contract implied that the partnership would determine when the managing agency terminated.

Held further, the terms as to relinquishment did not make the partnership one at will and though it was true that in the particular case as soon as one partner relinquished his right in favour of the other, the partnership would come to an end, that was however a fortuitous circumstance.

Held, therefore, the partnership was not a partnership at will which could be terminated by a notice under S. 43 by the partner in management to the other.

(WANCHOO J.)

Karumuthu Thiagaraja v. *Muthappa Chettiar*, 1961 SC 1225.

PERMANENT TENANCY—**determination—considerations.**

Mere possession for generations at a uniform rent or construction of permanent structures by itself may not be conclusive proof of a permanent tenancy but the cumulative effect of such fact coupled with several other facts may lead to the inference of a permanent tenancy.

Also the permanency of the tenure does not necessarily imply both fixity of rent and fixity of occupation. Therefore enhancement of rent a long time back, though it may be a circumstance to be taken into consideration does not necessarily militate against the tenancy being a permanent one.

Case-law referred to. (S. R. DAS J.)

Bijoy Gopal Mukherji v. *Pratul Chandra Ghose*, 1953 SCR 930 : 1953 SC 153 : 1953 SCJ 195 : 1953 SCA 217 : 8 DLR SC 216.

POST OFFICE—**agency**

Sending of cheque through post by debtor to creditor—whether post office is the agent of the sender or the addressee.

See *Commissioner of Income-tax, Bombay South* v. *Ogale Glass' Works Ltd.*, 1954 SCJ 522 : 1954 SC 429 : 1955 SCA 181 : 25 ITR 529 : 56 Bom LR 1196 : 1954 (2) MLJ 67 : 24 Comp Cas 520.

POWERS OF ATTORNEY ACT, 1882, **S. 2—Object of.**

The object of this section is to effectuate instruments executed by an agent but not in accordance with the rule of the Common Law and the enactment is more procedural than substantive. It does not confer on a person a right to act through agents. It presupposes that the agent has the authority to act on behalf of the principal, and protects acts done by him in exercise of that authority but in his own name.

But where the question is as to the existence or the validity of authority, the section has no operation. (VENKATARAMA IYER J.)

Ravulu Subba Rao v. *Commissioner of Income-tax*, 1956 SCR 577 : 1956 SC 604 ; 1956 SCA 1025 : 1956 SCJ 591 : (1956) 30 ITR 163 : 1956 (2) MLJ 43.

PRACTICE AND PROCEDURE

Appeal—discretionary orders—interference.

The appellate Court should be slow to interfere with the exercise of discretion by the trial Court and it is not open to the appellate Court to substitute its own discretion for that of the trial Judge. But if it appears that the trial Court in exercising a discretion has acted unreasonably or capriciously, has ignored relevant facts and has adopted an unjudicial approach it will be open to the appellate Court—in many cases it may be its duty—to interfere with the trial Court's exercise of discretion.

The trial Court and the first appellate Court, though they had differed in material particulars in regard to their approach and final decisions in regard to certain facts, agreed in the result that the discretion vested in them should not be exercised.

On appeal with special leave under Art. 136 to the Supreme Court, *held*, even though it may be that the Supreme Court, if it were trying the matter originally, might have come to a different conclusion and also might have hesitated to confirm the order of the trial court if it had been dealing with the matter as a Court of first appeal, it cannot justly interfere when the matter has come up under Art. 136, with the concurrent exercise of discretion by the lower Courts below unless the exercise of discretion of the lower courts is patently and manifestly capricious or perverse and may defeat the ends of justice. (GAJENDRAGADKAR J.)

Printers (Mysore) Private Ltd. v. *Pothan Joseph*, 1960 SC 1156 : 1960 (3) SCR 713 : 1961 Pat LR 6.

When the Courts below have in the exercise of their discretion refused to grant an equitable relief, the High Court will be justified in not interfering in second appeal with such exercise of discretion. (MAHAJAN J.)

Namdev Lokman Lodhi v. *Narmadabi*, 1953 SC 228 : 1953 SCR 1009 : 1953 SCJ 306 : 1953 SCA 517 : 8 DLR SC 336 : 55 Bom LR 517 : 55 PLR 312 : 1953 (1) MLJ 715 : 1952 MWN 592.

Finding of fact—interference—normal rule.

Where the decision of a fact depends upon the appreciation of oral evidence, the appellate Court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and observing their demeanour. The rule is—and it is nothing more than a rule of practice—that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then, unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where credibility lies, the appellate Court should not interfere with the trial court's finding of fact. The appellate Court will be wrong in thinking that it would detract from the value to be attached to the finding of fact by the trial judge if he does not expressly base his conclusion upon the impression he gathers from the demeanour of witnesses. (MUKHERJEA J.)

Sarju Pershad v. *Jwaleshwari*, 1951 SC 120 : BLR 1951 SC 114 : 1950 SCR 781 : 1950 SCJ 583 : 6 DLR SC 52 : 1951 AWR 176 : 64 LW 373 : 1951 ALJ 1.

When the rule does not apply.

The rule that weight should be given to the estimate of a judge who saw and heard a witness is no doubt a sound one but it can be pushed too far as pointed out by the Judicial Committee in 1945 PC 35 (at p. 37).

When the trial judge believes a witness not because of his demeanour but because the judge considered that the story of the witness was inherently probable, that is a matter which the appellate court is in as a good a position to appreciate as the trial judge. (BOSE J.)

Kedarlal v. *Harilal*, 1952 SC 47 : 1952 SCR 179 : 1952 SCJ 37 : 1952 (1) MLJ 431 : BLR 1952 SC 81 : 1952 MWN 104 : 65 LW 179 : 7 DLR SC 133.

Inference from other facts.

Where the question is not of credibility based entirely on the demeanour of witnesses observed by the trial Court, but of inference of a fact from proved primary facts, the appellate Court is in as good a position as the trial Court and is free to reverse the findings if the inference made by the trial Court is not justified. (DAS GUPTA J.)

Radhaprasad v. *Gajadhar Singh*, 1960 SCJ 73 : 1960 SC 115 : 1960 (1) MLJ 33 : 1960 (1) Andh WR 33 : 1960 (1) SCR 663 : 1960 MPLJ 1 : 1960 Nag LJ 1 : 39 Pat 55.

Appeal—New Plea—construction of grant.

The appellant sought to raise in appeal a new contention regarding the construction of a grant of *Chaukidari Chakran* lands which was not raised in his written statement in the trial court or at the trial. The respondent took no objection thereto and the point was decided in his favour by the 1st appellate court. In second appeal the High Court, before whom the defendant raised the same contention accepted the the plea and allowed the appeal. It was contended by the defeated plaintiff-appellant in the Supreme Court that the High Court should not have allowed the point to be raised in appeal.

Held (negativing the contention), as no evidence was admissible on a question of construction of the grant and the true nature of the grant was a matter to be decided on a construction of the terms of the document as a pure question of law, the High Court was right in allowing the point to be taken. (VENKATARAMA IYER J.)

Radha Sundar Dutta v. *Mohd. Jahadur Rahim*, 1959 SC 24 : 1959 SCJ 212 : 1959 SCR 1309.

Nature of property.

Where the suit is based on the ground that certain properties were the private properties of the plaintiff, he cannot be allowed to take a new plea in appeal that the properties were granted to him impressed with service to the Deity. (HIDAYATULLAH J.)

Narayan v. *Gopal*, 1960 (1) SCR 773 : 1960 SC 100 : 1960 SCJ 263 : 1960 (2) SCA 153.

Special custom.

Where the plaintiff failed to raise a plea as to a special custom in answer to the case set up by the defendant, no issue about it is framed and no attempt is made to prove it and the plaintiff furthermore admitted at the trial the general custom pleaded by the defendant, he cannot be permitted at the appellate stage to raise the new plea. (SARKAR J.)

Kirpal Kumar v. *Bachan Singh*, 1958 SCR 948 : 1958 SC 199 : 1958 SCJ 438 : (1958) Punj 807.

Vagueness of terms of contract.

The lower appellate Court had allowed the appellant to raise a plea that the terms of a letter on the basis of which a plea of extension of time for the performance of a contract was taken by the other side were so vague and uncertain that the agreement for extension of time was void under S. 29 of the Contract Act.

Held, as the plea raised is a plea of law based on the construction of the letter, it could be raised in appeal for the first time. (GAJENDRAGADKAR J.)

Keshavalal Lallubhai v. *Lalbhai Trikumlal Mills Ltd.*, 1958 SC 512 : 1958 SCJ 866 : 60 Bom LR 948 : 1959 SCR 213 : 1959 SCA 251.

Plea as to legal character.

A plea that a relinquishment of occupany rights in favour of a mortagagee by a person was made in his capacity as joint family manager, which is not made in the written statement cannot be allowed to be taken up in an appeal.

(S. R. DAS C. J.)

Lilachand Tuljaram v. *Mallappa Thukaram*, 1960 (1) SCR 693 : 62 Bom LR 134 : 1960 SC 85 : 1960 SCJ 96.

Effect of inadmissible evidence.

A judge must not take upon himself to say whether evidence improperly admitted had or had not an effect upon his mind. May be, when he says that it did not influence him in his judgment, he honestly intended that to be the case. But it is impossible to gauge the influence which such evidence had upon his mind. The judgment may have done perfect justice but upon general principles it cannot be supported.

6 Ves. Sun. 70 and 31 LJ Chancery (New series) 420 Relied on.

(BHAGWATI J.)

Payyavula Vengamma v. *Payyavulu Kesanna*, 1953 SC 21 : 1953 SCR 119 : 1952 SCJ 630 : 1953 SCA 16 : 8 DLR SC 33 : 1953 ALJ 73 : 1953 (1) MLJ 97 : 66 LW 180 : 1 BLJ 61.

Examination of parties.

Except in the few cases where exceptions are unavoidable both sides must be heard each in the presence of the other ; Courts must not in the administration of justice in whatever form, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or before merchants, permit one side to use means of influencing the conduct and the decisions of the judge, which means are not known to the other side.

7 Beav 455 Relied on ; 13 CLJ 399 Approved. (BHAGWATI J.)

Payyavula Vengamma v. *Payyavulu Kesanna*, (*ibid.*)

Issues.

The issues cannot be permitted to be stretched to cover matters which are not, on a reasonable construction, within the pleadings on which they are founded.

(S. R. DAS C. J.)

M.M.B. Catholicos v. *T. Paulo Avira*, 1959 SC 31 : (1958) Ker 1340 : 1958 Ker LT 721 : 1958 KLJ 874.

Pleadings—object of.

The object of requiring a party to put forward his plea in the pleadings is to enable the opposite party to controvert them and adduce evidence in support of

his case and it would be neither legal nor just to refer to evidence adduced with reference to a matter in issue and on the basis of that evidence to come to a conclusion on a matter which is not pleaded and which is not in issue and decide the rights of parties on the basis of that conclusion. (VENKATARAMA IYER J.)

Venkataraman Devaru v. *State of Mysore*, 1958 SCR 895 : 1958 SC 255 : 1958 SCJ 382 : 1958 (1) An WR 109 : 1958 (1) MLJ 109.

Power of Court.

It is always open to the court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs. (BOSE J.)

Kedarlal v. *Harilal*, 1952 SC 47 : 1952 SCR 179 : 1952 SCJ 37 : 1952 (1) MLJ 431 : BLR 1952 SC 81 : 1952 MWN 104 : 65 LW 179 : 7 DLR (SC) 133.

Relief of subrogation.

Where, though the plaintiff has not used the word "subrogation" he has asked in substance the relief to which a subrogee would be entitled under the Transfer of Property Act, the claim should not be thrown out on a mere technicality of pleading. (BOSE J.)

Kedarlal v. *Harilal*, (*ibid.*)

Proceedings in Court—Proof of.

Where there is a dispute as to what happened before a court or a tribunal, the statement of the presiding officer in regard to it is generally to be accepted as true in preference to that of a party. (VENKATARAMA IYER J.)

Union of India v. *T. R. Varma*, 1958 SCR 499 : 1957 SC 882 : 1958 SCA 110 : 1958 SCJ 142 : (1957) 13 FJR 237 : 1958 (1) MLJ 66 : 1958 MPC 61 : 1958 All LJ 126 : 1958 All WR 165 ; (1958) Punj 274 : 60 Punj LR 126.

Writ proceedings—Question of fact.

Questions whether certain trusts are public or private trusts or whether the properties are private or trust properties involve investigation of complicated facts and recording of evidence in such investigation cannot be done in writ proceedings.

1954 Patna 266 Affirmed. (S. K. DAS J.)

(*Mahant*) *Moti Das* v. *S. P. Sahi*, 1959 SC 942 : 1959 SCJ 1144 : 1959 Sup 2 SCR 563 : 1959 (2) SCA 432 : 38 Pat 639.

PRECEDENTS

Construction of documents.

In construing documents, the usefulness of precedents is usually of a limited character. (GAJENDRAGADKAR J.)

Trivenibai v. *Lilabai*, 1959 SC 620 : 1959 Sup 1 SCR 107 : 1959 SCA 333 : 1959 SCJ 594 : 1959 Nag LJ 290 : 1959 MPLJ 653 : 1959 MPC 572.

Construction of Statutes—Acts not *in pari materia.*

It is well settled that observations made with reference to the construction

of one statute cannot be applied with reference to the provisions of another statute not *in pari materia*. (SINHA J.)

Lilavati Bai v. *State of Bombay*, 1957 SC 521 : 1957 SCA 465 : 59 Bom LR 934 : 1957 SCJ 557.

Decisions on facts.

Decisions even of the highest Court on questions which are essentially questions of fact, cannot be cited as precedents governing the decision of other cases which must rest in the ultimate analysis upon their own particular facts. (SINHA J.)

Prakash Chandra Pathak v. *State of Uttar Pradesh*, 1960 SC 195.

English Law—Trade Marks.

As the law of trade marks adopted in the Indian Trade Marks Act, 1940 merely reproduces the English law with only slight modifications, a reference to the judicial decisions on the corresponding sections of the English Act is apposite and most helpful.

Registrar of Trade Marks v. *Ashok Chandra Rakhit Ltd.*, 1955 (2) SCR 252 : 1955 SC 558 : 1955 SCA 1043 : 1955 SCJ 562 : 1955 (2) MLJ 76 : 1955 MWN 935.

High Court—Benches of co-ordinate jurisdiction—difference of opinion.

When judges of co-ordinate jurisdiction of a High Court hold the view that a previous decision of the Court is wrong, the usual and correct procedure will be to refer the question to a larger Bench. Otherwise the result will be utter confusion ; and if one thing is more necessary in law than any other thing, it is the quality of certainty. (DAS GUPTA J.)

Mahadeolal Kanodia v. *Administrator General, W. Bengal*, 1960 (3) SCR 578 : 1960 SC 936 : 1961 (1) SCJ 15.

Full Bench—Conflict.

When it is found that a Full Bench is inclined to take a view contrary to that of another Full Bench of equal strength the better course will be to constitute a larger Bench ; otherwise the subordinate courts are placed under the embarrassment of preferring one view to another both equally binding on them. (SINHA J.)

Atma Ram v. *State of Punjab*, 1959 SC 519 : 1959 Sup 1 SCR 748 : 1959 SCJ 407.

Privy Council decisions—whether binding on Supreme Court.

A decision of the Privy Council is not binding on the Supreme Court. (VENKATARAMA IYER J.)

Srinivas v. *Narayanan*, 1955 (1) SCR 1 : 1954 SC 379 : 1954 SCJ 408 : 1954 SCA 878 : 9 DLR SC 320 : 57 Bom LR 678 : 67 LW 515 : 1954 (1) MLJ 630 : 1954 VLJ 781.

Though the Supreme Court is not bound to follow the principles laid down by the Privy Council too rigidly, some of them are useful as furnishing in many cases a sound basis for invoking the jurisdiction of the Supreme Court in granting special leave. (FAZL ALI J.)

Pritam Singh v. *State*, 1950 SCR 453 : 1950 SC 169 : 63 LW 875 : 86 CLJ 120 : 1950 MWN 605 : 51 Cr LJ 1270 : 53 PLR 1.

Supreme Court.

There is nothing in the Constitution which prevents the Supreme Court from departing from a previous decision if the Court is convinced of its error and its baneful effect on the general interests of the public. Art. 141 obviously refers to Courts other than the Supreme Court. But the Court should not lightly dissent from a previous pronouncement. The Court's power of review, which undoubtedly exists, must be exercised with due care and caution and only for advancing the public well-being in the light of the surrounding circumstances of each case brought to its notice.

If on a re-examination of the question the court comes to the conclusion that the previous majority decision was plainly erroneous then it will be its duty to say so and not to perpetuate its mistake even when one learned Judge who was party to the previous decision considers it incorrect on further reflection. The court should do so all the more readily when its decision is on a constitutional question and its erroneous decision has imposed illegal tax burden on the consuming public or has otherwise given rise to public inconvenience or hardship, for it is by no means easy to amend the Constitution. (S. R. DAS AG. C. J.)

Bengal Immunity Co., Ltd. v. *State of Bihar*, 1955 (2) SCR 603 : 1955 SC 661 : 1955 SCA 1140 : 1955 SCJ 672 : 34 Pat 905 : 1955 (6) STC 446.

See also *Dwarakadas Shrinivas* v. *Sholapur Spg. and Wvg. Co. Ltd.*, 1954 SCR 674.

Stare Decisis—**Principle.**

The doctrine of *stare decisis* has hardly any application to an isolated and stray decision of the Court very recently made and not followed by a series of decisions based thereon. In any case, the doctrine is not an inflexible rule of law and cannot be permitted to perpetuate the Court's errors to the detriment to the general welfare of the public or a considerable section thereof.

Bengal Immunity Co., Ltd. v. *State of Bihar*, 1955 (2) SCR 603 : 1955 SC 661 : 1955 SCA 1140 : 1955 SCJ 672 : 34 Pat 905 : 1955 (6) STC 446.

Previous decision wholly unsustainable.

Apart from any question as to the courts being of co-ordinate jurisdiction, a decision which has been followed for a long period of time and has been acted upon by persons in the formations of contracts, dispositions of property or in the general conduct of affairs or in legal procedure or in other ways, will genarally be followed by courts of higher authority than the Court establishing the rule even though the Court before whom the matter arises afterwards might not have given the same decision had it come before it originally. But this rule of *stare decisis* is not so imperative or inflexible as to preclude a departure therefrom in any case and previous decisions should not be followed to the extent that error may be perpetuated or grievous wrong result.

In overruling 32 Pun Re (1895) 124 and (1924) 5 Lah 356 and preferring (1950) Punj 1, the Supreme Court *held* that the previous decisions were wholly unsustainable and the overrruling of them could not be said to shake any title or contract or that pending actions would be disturbed but on the other hand titles of alienees were made thereby more secure and that therefore the principle of *stare decisis* was inapplicable. (GAJENDRAGADKAR J.)

Maktul v. *Manbhari*, 1958 SC 918 : 1958 SCJ 1268 : 1959 SCR 1099 : (1958) Punj 2305.

Authorities not unanimous.

An argument based on the doctrine of *stare decisis* is of no avail, when the decision is not acquiesced in for a long time, or when the authorities are not absolutely unanimous and cannot preclude the Supreme Court from correcting the error. (KAPUR J.)

Central India Spinning and Weaving and Manufacturing Co. v. *Municipal Committee, Wardha*, 1958 SCR 1102 : 1958 SC 341 : 1958 SCJ 604 : 1958 MPLJ 775 : 1958 Nag LJ 595.

Privy Council decision—reconsideration.

Having regard to the fact that the *stare decisis* in 69 Ind App 145 (P. C.) that a sister under the Hindu Law of Inheritance (Amendment) Act 1929, includes a half-sister, was given settling the conflict of judicial opinion in India, at a time when the decision of the Privy Council was binding on all courts in India, and to the fact the question was not raised in the High Court which decided the matter after the Constitution had come into force the Supreme Court refused to allow the appellant to canvass the correctness of the Privy Council decision. (S. K. DAS J.)

Dolgobinda v. *Nimai Charan*, 1960 SCJ 879 : 1959 SC 914 : 1959 Sup 2 SCR 814 : 26 Cut LT 130 : 1960 (1) SCA 39.

PRE-EMPTION

Origin and growth of the law in India—discussed in

Audh Behari Singh v. *Gajadhar Jaipuria*, 1955 (1) SCR 70 : 1954 SC 417 : 1954 SCJ 590.

Nature of the right of.

It will not be correct to say that the right of pre-emption under Muhammadan Law is (merely) a personal right on the part of the pre-emptor to get a re-transfer of the property from the vendee who has already become the owner thereof. The law of pre-emption creates a right which attaches to the property and on that footing only it can be enforced against the purchaser. The correct legal position seems to be that it imposes a limitation or disability upon the ownership of property to the extent that it restricts the owner's unfettered right of sale and compels him to sell the property to his cosharer or neighbour as the case may be. The cosharer or neighbour consequently gets an advantage or benefit corresponding to the burden with which the owner of the property is saddled even though it does not amount to an actual interest in the property sold.

4 Beng LR 134 (FB) Overruled ; 7 All 775 (FB), 1 Patna 578, (1941) Bombay 460 (FB) and the minority view in 4 Beng LR 134 Approved. (MUKHERJEA J.)

(**Note** :—The Supreme Court expressed no opinion on the view of MAHMOOD J. in 7 All 775 (FB) that the right of pre-emption partakes strongly of the character of an easement in law).

Audh Behari Singh v. *Gajadhar Jaipuria*, 1954 SC 417 : 1955 (1) SCR 70 : 1954 SCJ 590 : 1955 SCA 132 : 1954 ALJ 529 : 2 BLJ 451.

Right of substitution and not re-purchase.

The right of pre-emption consists of a primary or inherent right to the offer of a thing about to be sold and a secondary or remedial right to follow the thing sold. It is a right of substitution and not of re-purchase, that is, the pre-emptor steps into the shoes of the original vendee. It is a right to acquire the whole of the

property sold and not a share therein. The plaintiff must have a superior right to that of the vendee or the person substituted in his place. The right may be defeated by the vendee allowing the claimant of a superior or equal right being substituted in his place. (SUBBA RAO J.)

Bishan Singh v. *Khazan Singh*, 1959 SCR 878 : 1958 SC 838 : 1958 SCJ 1234 : (1958) Punj 2225.

Sufficiency of first demand made before registration of sale deed.

A sale deed was executed on 31-1-1946 and presented for registration. The pre-emptor on coming to hear of the execution of the sale deed, made the *talab-i-mowasibat*, which has to be made after the completion of the sale in order that the right may be enforced, on 2-2-46. The document was copied in the Registrar's books only on 9-2-46. The question was whether the preliminary demand was made after the completion of the sale, as the law required it to be done.

Held, the sale was not complete on 31-1-46 and it was complete only on 9-2-46 when the registration became complete as provided in S. 61 of the Registration Act and Sec. 47 of the Registration Act did not make the sale complete on 31-1-46 and that therefore the pre-emptor was not entitled to enforce his right as he had not made the requisite preliminary demand after the completion of the sale, viz., after 9-2-46.

1926 All 549 Criticised. (SARKAR J.)

Ram Saran Lall v. *Mst. Domini Kuer*, 1961 SC 1747.

Hindus—proof of custom among.

When the existence of a custom under which Hindus claim to have the same rights of pre-emption as Muhammadans in any District is generally known and judicially recognised it is not necessary to prove it by further evidence. A long course of decisions has established the existence of such custom in Bihar, Sylhet and certain parts of Gujarat. (MUKHERJEA J.)

Audh Behari Singh v. *Gajadhar Jaipuria*, 1954 SC 417 : 1955 (1) SCR 70 : 1954 SCJ 590 : 1955 SCA 132 : 1954 ALJ 529 : 2 BLJ 451.

Non-natives—whether subject to the custom.

The right of pre-emption is an incident of property and attaches to the land itself. Therefore when it rests upon custom it becomes the *lex loci* or the law of the place and affects all lands in that place irrespective of the religion or nationality or domicile of the owners of the lands except where such incidents are proved to be a part of the custom itself. Hence the contention that, as a matter of law, a local custom of pre-emption does not affect or bind persons who are not natives of or domiciled in that area, cannot be accepted.

24 WR 95 and 32 Cal 988 Overruled. (MUKHERJEA J.)

Audh Behari Singh v. *Gajadhar Jaipuria*, (*ibid.*)

Substitution of pre-emptor—when takes effect.

In the case of a pre-emption decree whereunder the pre-emptor gets possession only if he pays a specified amount within a particular time and which also provides for the dismissal of the suit in case of default, the substitution takes effect only when the condition is complied with and not on the day when the decree is passed.

44 Ind. App. 80 Relied on. (SUBBA RAO J.)

Bishan Singh v. *Khazan Singh*, 1958 SC 838 : 1958 SCJ 1234 : 1959 SCR 878 : (1958) Punj 2225.

Avoidance.

There are no equities in favour of a pre-emptor whose sole object is to disturb a valid transaction by virtue of rights created in him by statute. To defeat the law of pre-emption by any legitimate means is not fraud on the part of either the vendor or the vendee and a person is entitled to steer clear of the law of pre-emption by all lawful means. (KAPUR J.)

Radhakishan L. Toshniwal v. *Sridhar Ramachandra*, 1960 SC 1368: 1960 Nag LJ 684.

PRESIDENCY SMALL CAUSE COURTS ACT, 1882, **Ss. 43 and 41—Nature of order.**

Although under the rules framed under the Act, an application under S. 41 is initiated by a plaint, the proceeding is not a suit and the order for delivery of possession does not strictly speaking amount to a decree for recovery of possession.

1927 Bom. 556 Referred to ; 1952 Cal. 199 Reversed ; 1951 Cal. 32, 55 CWN 347, 55 CWN 421, 1952 Cal 126, and 1952 Cal 273 (FB) Overruled.
(S. R. DAS J.)

Nalinakhya Bysack v. *Shyamsunder Haldar*, 1953 SC 148 : 1953 SCR 533 : 1953 SCJ 261 : 1953 SCA 191.

PRESIDENCY TOWNS INSOLVENCY ACT, 1909, **S. 55—applicability of S. 92 of the Evidence Act.**

S. 92 of the Evidence Act does not apply to proceedings under S. 55, between the Official Assignee and the transferee from the insolvent and therefore in such a proceeding the transferee will not be precluded from leading evidence of an oral agreement for the purpose of contradicting, varying, adding to or subtracting from the terms of the impugned document.

In a proceeding under S. 55 to set aside a deed of gift by an insolvent, the transferee pleaded and sought to lead evidence to show that though the document purported to be a gift, it was really a transaction supported by valuable consideration. The High Court held that it was not open to the transferee to lead such evidence under S. 92 of the Evidence Act.

Held (reversing the decision), the transferee was entitled to lead evidence in support of the plea raised by him.

1955 Bombay 122 Reversed. (GAJENDRAGADKAR J.)

Hira Devi v. *Official Assignee, Bombay*, 1958 SC 448 : 1959 SCA 136 : 1958 SCJ 766 : (1958) 2 An WR 108 : 60 Bom LR 932 : 1958 (2) MLJ 108 : 1958 SCR 1384.

PRIVATE INTERNATIONAL LAW—**proper law of a contract—determination.**

Whether the proper law of a contract is the *lex loci contractus* or *lex loci solutionis* is a matter of presumption, but there are acceptable rules to determine which of them is applicable. Where the parties have expressed themselves, the intention so expressed overrides any presumption. When there is no expressed intention then the rule to apply is to infer the intention from the terms and nature of the contract and from the general circumstances of the case.

Where a contract contained a clause that in case of dispute an Indian Court

would have jurisdiction and another clause which indicated an arbitration in India, *held*, these circumstances clearly established that the proper law to be applied was the Indian law. (HIDAYATULLAH J.)

Dhanrajamal Gobind Ram v. *Shamji Kalidas & Co.*, 1961 SC 1285.

PRIZE COMPETITION ACT, 1955—**applicability to competitions of skill.**

The competitions sought to be controlled and regulated by the Act are only those in which success does not depend to any substantial degree on skill. Assuming that S. 2 (d) of the Act includes also competitions in which success depends to a substantial degree on skill, then the Act is invalid so far as regards such competitions as being an unreasonable restriction on the fundamental right conferred by Art. 19 (1) (g) of the Constitution. (VENKATARAMA IYER J.)

R.M.D. Chamarbaugwalla v. *Union of India*, 1957 SC 628 : 1957 SCJ 593 : 59 Bom LR 973 : 1957 (2) MLJ 76 : 1957 SCA 912.

Applicability to gambling.

Assuming that the Act applies to all kinds of competitions, those in which success depends to a substantial extent on skill and those in which success does not so depend, the provisions are severable in their application to the latter. (VENKATARAMA IYER J.)

R.M.D. Chamarbaugwalla v. *Union of India*, (*ibid.*)

PROVIDENT FUNDS ACT, 1925, **Ss. 2 (a) and 3(1)—Fund at credit of depositor—Execution against, by appointment of Receiver.**

Provident Fund money is inalienable and is exempt from attachment. Normally no execution can lie against such a sum. The prohibition against such assignment or attachment is based on ground of public policy. When the interdiction is absolute, to allow a judgment creditor to get at the fund indirectly by the appointment of a receiver would be to circumvent the statute. Such a frustration of the object of the legislation should not be permitted. Execution cannot be sought against the Provident Fund money by way of appointment of a receiver.

1951 Cal. 125 Reversed ; 1925 PC 176 Distinguished ; (1887) 18 QBD 127 Relied on.

The fact that the Provident Fund money has not been paid to the subscriber after his retirement does not make it any the less a compulsory deposit within the meaning of the Act. (CHANDRASEKHARA IYER J.)

Union of India v. *Hira Devi* , 1952 SC 227 : 1952 SCR 765 : 1952 SCJ 326 : 90 CLJ 95 : 1952 (2) MLJ 265 : BLR 1952 SC 261 : 1952 MWN 511 : 65 LW 628 : 7 DLR SC 330 : 1952 SCA 323.

PROVINCIAL INSOLVENCY ACT, 1920, **S. 2 (d)—property—Provident Fund.**

The word 'property' has been used in the widest possible sense which includes even property which may belong or is vested in another but over which the insolvent has a disposing power. The view that the 'property' must be such that the insolvent has an absolute and unconditional present disposing power over the same is not correct. For this part of the definition has reference obviously to powers of appointment and the power of a Hindu father.

Hence on the adjudication of an employee of a company as an insolvent money standing to his credit in the company's Provident Fund will vest in the Official Receiver. The fact that on the date of the adjudication the insolvent cannot

transfer the property does not militate against the view that he has a vested interest in the same. For he has a present interest in the money though it may become payable to him or to his nominess only in the future.

1951 Patna 488 Reversed. (CHANDRASEKHARA IYER J.)

Muktilal Agarwala v. *Trustees of the Provident Fund of Tin Plate Co.*, 1956 SCR 100 : 1956 SC 336 : 1956 SCA 675 : 1956 SCJ 406 : 1956 Lab LJ 215 : 69 LW 930 : 1956 ALJ 383 : 1956 (1) MLJ 183 : (1956-57) 10 FJR 350.

S. 28 (A)—Retrospective.

The language of the section indicates that its operation has been expressly made retrospective.

The conflict of judicial opinion whether the powers of a father under the Mitakshra law to alienate joint family property including the interest of his sons in the same for discharge of an antecedent debt not contracted for illegal or immoral purposes vests in the Official Receiver in the insolvency of the father has been set at rest by the enactment of S. 28 (A) under which section such power is "property" and vests in the Official Receiver.

AIR 1946 Mad 434 Reversed. (MUKHERJEA J.)

Cheruvu Nageswaraswami v. *V. Viswasundara Rao*, 1953 SC 370 : 1953 SCR 894 : 1953 SCJ 539 : 8 DLR SC 509 : 1953 (2) MLJ 252.

S. 53—Burden of proof.

In an application under the section, the burden lies on the Receiver to show that either there was no valuable consideration or the transaction was not in good faith. His application can be allowed on proof either that there was no consideration for the transaction or that the consideration was so inadequate as to raise a presumption of want of good faith. Alternatively, the Receiver may also succeed on showing that though there was valuable consideration for the transaction impeached there was want of good faith in the sense that the transferee knowing all the circumstances of the transferor who had since been adjudged insolvent, entered into the transaction with a view to screening the assets of the insolvent from the Receiver in whom the property vests for the benefit of the creditors. It is not necessary that the transferor should have been honest and straightforward in the matter of the transaction impeached. If he was really so there will not be much difficulty in concluding that the transaction as a whole was bonafide. Even if the transferor was wanting in bonafides, unless it is found that the transferee was wanting in bonafides (sharing in the common intention to defeat or delay the creditors) in respect of the transaction, he cannot be affected by the dishonest course of conduct of the transferor. (SINHA J.)

Subramania Iyer v. *Official Receiver, Quilon*, 1958 SCR 257 : 1958 SC 1 : 1958 SCJ 172 : 1958 KLJ 17 : 1958 KLT 1195.

S. 54—effect of annulment.

Even where the order of adjudication is based on an act of insolvency constituted by a transfer of property found to be a fraudulent preference in proceedings under S. 54, the transfer stands till it is set aside and the transferee has, till then, all the rights in the property transferred.

70 Ind. App. 93 Explained. (SARKAR J.)

Ramaswami Chettiar v. *Official Receiver*, 1960 SCJ 128 : 1960 SC 70 : 1960 (1) SCR 616 : 1960 (1) MLJ 41 : 1960 (1) Andh WR 41.

PUBLICATION OF ACTS AND ORDERS.

Natural justice requires that before a law can become operative it must be promulgated or published.

Acts of Parliament are publicly enacted and also receive wide publicity. Not so proclamations and orders. There must therefore be promulgation and publication in their cases.

1951 Raj 25 Reversed.

(In the circumstances of the case it was *held* that the Jaipur Opium Act, 1924 passed by a council of ministers acting during the minority of the Ruler did not acquire the force of law as there had been no sufficient publication in the Gazette or promulgation.) (BOSE J.)

Harla v. *State of Rajasthan*, 1951 SC 467 : 65 LW 2 : 1952 SCR 110 : 1951 SCJ 735 : 7 DLR SC 66 : BLR 1952 SC 26 : 88 CLJ 265 : 53 Cr LJ 54 : 1952 MWN 67.

PUBLIC SERVANTS—**orders of—their duties.**

Public orders publicly made in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order as to what he meant or intended. Such orders are meant to have public effect and are intended to affect the conduct of those to whom they are addressed and must be construed objectively with reference to the language used therein. Persons to whose detriment such orders are made are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what authority is making the order. (BOSE J.)

Commissioner of Police, Bombay v. *Gordhandas Bhanji*, 1952 SC 16 : 1952 SCR 135 : 1951 SCJ 803 : BLR 1952 SC 56 : 65 LW 212 : 54 Bom LR 383 : 7 DLR SC 112 : 1952 SCA 53.

PUNJAB COURTS ACT, 1918—**Court of the Senior Subordinate Judge.**

Under the Act, the Court of the Senior Subordinate Judge is not the same court as the Court of the Subordinate Judge of the 1st class. The Senior Subordinate Judge to whom appeals are preferred from Subordinate Judges is a separate and distinct Court. (BOSE J.)

Kuldip Singh v. *State of Punjab*, 1956 SC 391 : 1956 SCA 809 : 1956 SCJ 387 : (1956) Punj 1075 : 1956 Cr LJ 78 : 1956 SCC 455 : 58 Pun LR 595.

Court of the Additional District Judge.

Under the Punjab Courts Act, the Court of the Additional District Judge is not a division court of the Court of the District Judge but a separate and distinct court of its own. (BOSE J.)

Kuldip Singh v. *State of Punjab*, (*ibid.*)

PUNJAB FORWARD CONTRACTS ACT, 1951—**validity.**

The words 'forward contract' as defined in the Act do not set out all the elements which are necessary to render a contract a wagering contract. The Act to tax forward contracts as defined does not come within Entry 62 of List II of the Seventh Schedule to the Constitution ; nor can the Act fall within Entry 7 of the Concurrent List. The Act is thus beyond the legislative competence of the State Legislature.

The whole Act must be held to be void since the portion of the Act which would be valid is not severable from the portion which would remain invalid.

1957 SC 628 Relied on. (DAS GUPTA J.)

B and G Exchange Ltd. v. *State of Punjab*, 1961 SC 268.

PUNJAB LAND REVENUE ACT, 1887, **Ss. 44 and 31—Entries in** *Jamabandi*.

Entries in *Jamabandis* fall within the record of rights under S. 31 and therefore shall be presumed to be true until the contrary is proved. (GHULAM HASAN J.)

Chhote Khan v. *Mal Khan*, 1954 SC 575 : 1955 (1) SCR 60 : 1954 SCJ 577.

S. 44—entries in *wajib-ul-arz*.

The *wajib-ul-arz* or village administration paper is a record of existing customs regarding rights and liabilities in the estate. It is not to be used for the creation of new rights or liabilities.

It is a part of the record of rights and entries duly made therein shall be presumed to be true.

The *wajib-ul-arz* though it does not create title gives rise to a presumption in its support which prevails unless the presumption is properly displaced. Also the *wajib-ul-arz*, being a part of the revenue record, is of greater authority than the *Riwaj-i-am* which is of general application and is not drawn up in respect of individual villages. Whether the statutory presumption attaching to an entry in the *wajib-ul-arz* has been properly displaced or not must depend upon the facts of each case.

1918 PC 4 and 2 Lah 346 Referred to. (S. K. DAS J.)

Rajendar Chand v. *Mst. Sukhi*, 1956 SCR 889 : 1957 SC 286 : 1957 SCA 251 : 1957 SCJ 119.

PUNJAB SIKH GURUDWARAS ACT, 1925, **S. 25-A—whether exception to S. 88 (2).**

S. 88 (2) provides with reference to committees under Sec. 85, that, as soon as all the members described therein have been elected or co-opted the fact should be duly notified, and also declares in clear and categorical terms that the date of the publication of the notification shall be deemed to be the date of the constitution of the committee. In the face of this deeming provision relating to these committees, it is not permissible to impute to such a committee any other date as the date of its constitution for any of the purposes of the Act and to imply an exception in the case of Sec. 25-A.

Shiromani Gurudwara Prabandak Committee v. *Raghubir Singh*, 1955 (2) SCR 67 : 1955 SC 455 : 1955 SCJ 466 : 57 Pun LR 264.

S. 29 (2)—effect.

The effect of S. 29 (2) is not to exclude jurisdiction, but to operate only as a limited stay until a specific issue is determined by the Tribunal.

(JAGANNADHADAS J.)

Shiromani Gurudwara Prabandak Committee v. *Shiv Rattan Dev*, 1955 SC 576.

S. 148-B—validity.

S. 148-B (added by the amending Act of 1959) does not violate the fundamental right of the Sikhs under Art. 26 (b) of the Constitution. (S. K. DAS J.)

Sarup Singh v. *State of Punjab*, 1959 SC 860 : 1959 SCJ 1115 : 1960 (1) SCA 163.

RAILWAY ESTABLISHMENT CODE, **Rule 2046/2-(a)—scope.**

The correct interpretation of the rule is that a railway ministerial servant falling within this clause may be compulsorily retired on attaining the age of 55 but when he is between the age of 55 and 60 the appropriate authority has the option to continue him in service subject to the condition that he continues to be efficient but the authority is not bound to retain him even if a servant continues to be efficient and such servant has no right to be retained in service till the age of 60 years.

1954 SC 584 Explained ; 1953 All. 352, 1956 Cal. 93 and 1954 Punj. 245 Approved ; 1959 All. 434 Affirmed. (DAS GUPTA J.)

Kailash Chandra v. *Union of India*, 1961 SC 1346.

RAILWAYS ACT, 1890

S. 77—Notice—validity.

Where the validity of the notice was conceded in the trial Court, and this concession was not questioned in the appellate court, the matter cannot be allowed to be reopened in second appeal. (SUBBA RAO J.)

Union of India v. *Amarsingh*, 1960 SCJ 543 : 1960 SC 233 : 1960 (2) SCR 95 : (1960) 1 Punj 536.

S. 77 and S. 72—Suit for compensation for non-delivery of goods.

The provisions of Articles 30 and 31 of the Limitation Act cannot be projected upon sections 72 and 77 of the Railways Act. It is not possible to hold that a suit for compensation for loss because of non-delivery of goods does not fall within S. 77. Hence the plea that such a suit is not for loss, destruction or deterioration of goods and therefore to the enforcement of a claim of that variety by action in a Court of law, a notice under S. 77 is not a condition precedent cannot be accepted.

1952 All. 897 (FB) Reversed ; (1929) 8 Patna 545 and (1953) I All 64 (FB) Overruled. (SHAH J.)

Governor-General-in-Council v. *Musaddilal*, 1961 SC 725.

RAJASTHAN PUBLIC DEMANDS RECOVERY ACT, 1952—**Validity.**

It cannot be said that the Act in so far as it enables money due to Government in respect of trading activities to be recovered by way of public demand offends Art. 14 of the Constitution. (SARKAR J.)

Mannalal v. *Collector of Jhalawar*, 1961 SC 828 : 1961 (1) SCA 665.

S. 4—validity of certificate.

In the case of a loan due to the Government no question of stating the period for which the demand is due arises and a certificate cannot be said to be defective for not stating this particular in the prescribed form. (SARKAR J.)

Mannalal v. *Collector of Jhalawar*, (*ibid.*).

S. 6—amount due to Jhalawar State Bank—whether a "public demand."

A sum due to the Jhalawar State Bank which was one of the assets of Jhalawar State which upon the formation of the United State of Rajasthan had vested in the latter State is an amount due to the State and is a "public demand" within the meaning of the Act and is recoverable as such by proceedings under the Act. It cannot be contended that the Jhalawar State Bank having been transferred to the Bank of Rajasthan Ltd., the sum was due to the Bank of Rajasthan in its own right, for it would only be recovered by that Bank as agent of the State. (SARKAR J.)

Manna lal v. *Collector of Jhalawar*, (*ibid.*).

RECEIVER—**Nature of possession.**

The receiver represents the real owner, whoever he may be and the true owner does not by the mere appointment of a receiver cease to be a landholder under the Madras Estates Land Act. (FAZL ALI J.)

Ramakrishna Rao v. *Kandokori Chellayamma*, 1953 SC 425 : 1950 SCR 806.

REGISTRATION ACT, 1908

S. 2 (7) and S. 17 (1) (d)—agreement to lease.

The expression "agreement to lease" covers only such agreements as create a present demise. (GAJENDRAGADKAR J.)

Trivenibai v. *Lilabai*, 1959 SC 620 : 1959 Sup 2 SCR 107 : 1959 SCA 333 : 1959 SCJ 594 : 1959 Nag LJ 290 : 1959 MPLJ 653 : 1959 MPC 572.

S. 17 [(1) The following documents shall be registered,....., namely—
(a) instruments of gifts of immoveable property ;
(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property ;
(c) .....
(d) leases of immoveable property from year to year or for any term exceeding one year or reserving a yearly rent ;
.....
(2) Nothing in clauses (b) and (c) of sub-section (1) applies to—
.....
(v) any document not itself creating.....any right.....but merely creating a right to obtain another document which will, when executed, create.....any such right..... ; or
(vi) any decree or order of a Court, except a decree.....made on a compromise and comprising immoveable property other than.....the subject matter of the suit.....
.....]

Cl. (b) of sub-sec. (1)—remission of mortgage amount.

In the case of a receipt for payment of money due on a mortgage it is only the payment of money that extinguishes the mortgage or limits the liability and the receipt only evidences the fact. But in the case of a release or remission, the extinguishment or dimunition of liability is effected by the agreement itself and not by something external to it. If the agreement is oral it is hit by proviso 4 to S. 92 of the Evidence Act as it rescinds or modifies the mortgage contract. If it is in writing it is hit by S. 17 (1) (b) of the Registration Act for in that case the writing itself 'extinguishes' or 'limits' the mortgage liability. (BOSE J.)

Kashinath Bhaskar v. *Bhaskar Vishweshwar*, 1952 SC 153 : 1952 SCR 491 : 1952 SCJ 150 : 1952 MWN 451 : 54 Bom LR 543 : BLR 1952 SC 187 : 7 DLR SC 180 : 1952 SCA 221.

Varying the rate of interest on a mortgage.

Where the rate of interest a mortgagee is to receive is varied to his advantage or otherwise, his "interest" in the mortgaged property is affected. A fresh "interest" is created or the original "interest" is limited.

1938 Rang 285 Approved.

Hence a subsequent document altering the rate of interest provided in a mortgage is compulsorily registrable. (BOSE J.)

Kashinath Bhaskar v. *Bhaskar Vishweshwar*, (*ibid.*)

Partition deed.

Partition in the Mitakshara sense may be only a severance of the joint family status, that is a joint title becoming a divided title, without an actual division of any property by metes and bounds. It may also mean what is understood by partition amongst co-sharers who are not coparceners. A partition in the latter sense may be effected orally but if the parties reduce the transaction to a formal document which is intended to be evidence of partition it has the effect of declaring the exclusive title of each coparcencer to the property allotted to him and falls within the mischief of S. 17 (1) (b). But partition in the former sense has no reference to immoveable property. It only affects the status of the member. Such a change of status of a divided member having a defined share in the ancestral property may be effected orally or be brought about by a document. If the document does not evidence a partition by metes and bounds it does not fall within S. 17 (1) (b), for so long as there is no partition in that sense the interest of the separated member continues to extend over the entire joint family property as before.

Hence so far as a document is evidence of partition only in the former sense it is not compulsorily registrable under S. 17 and S. 49 is not a bar to its being received in evidence for the limited purpose of showing that there was a division in status. (IMAM J.)

Nani Bai v. *Gita Bai*, 1958 SC 706 : 1959 SCA 173 : 1958 SCJ 925 : 1959 SCR 479 : 61 Bom LR 523.

Cl. (d)—agreement to lease—must create present demise.

An agreement to lease to fall within the definition of lease must effect an actual demise and create a present and immediate interest in the land.

Where a compromise decree creating an underlease was to take effect only on condition that one party was to pay to another party a certain sum within a specified period, *held*, it was a contingent agreement not falling within cl. (d). (PATANJALI SASTRI J.)

Manganlal v. *Mohammed Moinul Húque*, 1950 SCR 833 : 1951 SCJ 9 : 6 DLR SC 62 : 1951 ALJ 121 : 30 Pat 256 : 1951 SC 11 : 64 LW 350 : 1951 CWN 228 : BLR 1951 SC 10.

A deed was in the following terms :—

"I have this day given to you the land described below which is owned by me. Now you have become the occupancy tenant of the same. My estate and heirs have no right thereto. You shall become the owner of the land from 1-6-44.

I will have no right thereto after the said date. The estate described has been given to you in lieu of the sum of Rs.....due to you subject to the condition that in case your amount has not been paid to you on the said date, you may fully enjoy the estate."

Held, the document was not an agreement to lease under S. 2 (7) and so did not require registration.

1955 Nagpur 170 Affirmed. (GAJENDRAGADKAR J.)

Trivenibai v. *Lilabai*, 1959 SC 620 : 1959 Sup (2) SCR 107 : 1959 SCA 333 : 1959 MPLJ 653 : 1959 MPC 572 : 1959 SCJ 594 : 1959 Nag LJ 290.

Clause (v) of sub-section (2).

When the document itself creates an interest in immovable property, the fact that it contemplates the execution of another document will not exempt it from registration under this clause.

Observation in Sir D. F. Mulla's Registration Act, 5th edn. at p. 86 Approved. (BOSE J.)

Kashinath Bhaskar v. *Bhaskar Vishweshwar*, 1952 SC 153 : 1952 SCR 491 : 1952 SCJ 150 : 1952 MWN 451 : 54 Bom LR 543 : BLR 1952 SC 187 : 7 DLR SC 180 : 1952 SCA 221.

Clause (vi)—amendment not retrospective.

The amendment of Cl. (vi) in 1929 excluding from the scope of the exception compromise decrees comprising immoveable property other than that which is the subject matter of the suit does not apply to decrees passed before 1-4-30, the date of commencement of the amending Act of 1929. (PATANJALI SASTRI J.)

Manganlal v. *Mohammad Moinul Huque*, 1950 SCR 833 : 1951 SCJ 9 : 6 DLR SC 62 : 1951 ALJ 121 : 30 Pat 256 : 1951 SC 11 : 64 LW 350 : 1951 CWN 228 : BLR 1951 SC 10.

Ss. 32 and 33—Power of attorney.

S. 32 will apply only if a power-of-attorney is presented merely for authentication, in which case the only requirements that are to be complied with are those set out in S. 33. Even if a power of attorney is presented for registration and that presentation is unauthorised that does not detract from the validity of a subsequent authentication before the Registrar which is an independent act and is valid under S. 33. (VENKATARAMA IYER J.)

Kishore Chandra Singh v. *Ganesh Prasad Bhagat*, 1954 SC 316 : 1954 SCR 919 : 1954 SCJ 395 : 1954 SCA 979 : 9 DLR SC 257 : 1954 (1) MLJ 622 : (1954) Pat 313.

S. 33—Jurisdiction of Registrar.

It must be presumed that when the Registrar has authenticated a power of attorney under S. 33, he did so on an application setting out the proper ground and that he satisfied himself that the ground did exist. Whether he was right in his conclusion that the executant was suffering from bodily infirmity is not a matter which can be gone into in a Court. It is a matter exclusively within his jurisdiction and any error which he might have committed would not affect the validity of the registration of a document pursuant to such a power-of-attorney. (VENKATARAMA IYER J.)

Kishore Chandra Singh v. *Ganesh Prasad Bhagat*, (*ibid.*)

S. 33 (1) (a)—Residence.

Even temporary residence at a place is sufficient to clothe the Registrar of that place with jurisdiction. (VENKATARAMA IYER J.)

Kishore Chandra Singh v. *Ganesh Prasad Bhagat*, (*ibid.*)

S. 49 [No document required by section 17 or.....the Transfer of Property Act, 1882, to be registered, shall—
(a) affect any immoveable property comprised therein, or
(b) .....
(c) be received as evidence of any transaction affecting such property.....
unless it has been registered.
Provided that an unregistered document affecting immoveable property and required..... .....to be registered may be received as evidence of a contract in a suit for specific performance.....or as evidence of part performance.....or as evidence of a collateral transaction not required to be effected by registered instrument.]

Filing of unregistred award.

Under S. 49 the filing of an unregistered award is not prohibited. What is prohibited is that it cannot be taken into evidence so as to affect immovable property falling under S. 17. (KAPUR J.)

Champalal v. *Samarath Bai*, 1960 SC 629 : 1960 SCJ 969 : 1960 (2) SCR 810 : 1960 MPC 294.

Agreement of lease.

An unregistered agreement of lease creating a present demise is admissible in evidence of part performance under S. 53A of the Transfer of Property Act. (MAHAJAN J.)

Maneklal Mansukhbai v. *Ginwalla*, 1950 SCR 75 : 1950 SC 1 : 1950 SCJ 317 : 5 DLR SC 11 : 1950 RLW 117 : 52 Bom LR 521 : 1950 (2) MLJ 344 : 63 LW 495.

Collateral purpose—nature of possession.

To admit in evidence an unregistered document (which requires registration) executed by a person who had been in possession before the date of the document to show the nature of his possesion subsequent to it will be to treat it as operating to destroy the nature of his previous posession and to convert what had started as adverse possession into a permissive possession and therefore give effect to the agreement contained in it which is barred by S. 49. (A. K. SARKAR J.)

Kirpal Kumar v. *Bachan Singh*, 1958 SCR 948 : 1958 SC 199 : 1958 SCJ 438 : (1958) Punj 807.

RELIGIOUS ENDOWMENT—**Adverse possession by shebait.**

If a shebait by acting contrary to the terms of his appointment or in breach of his duty as such shebait could claim adverse possession of the dedicated property against the idol it would be putting a premium on dishonesty and breach of duty on his part and no property dedicated to an idol would ever be safe. The shebait for the time being is the only person competent to safeguard the interests of the idol, his possession of the dedicated property is possession of the idol whose *sevait* he is, and no dealing of his with the property dedicated to the idol could afford the basis of a claim by him for adverse possession against the idol. No shebait can, so long as he continues to be the shebait, ever claim adverse possession of the dedicated property against the idol.

Observation of RANKIN C. J. in 60 Cal. 54 Approved. (BHAGWATI J.)

Sree Sree Ishwar Sridhar Jew v. *Sushila Bala*, 1954 SC 69 : 1954 SCR 407 : 1954 SCJ 17 : 1954 SCA 498 : 9 DLR SC 85 : 1954 AWR 325.

Partial dedication.

It is quite true that a dedication may be either absolute or partial. The property may be given out and out to the idol or it may be subjected to a charge in favour of the idol. The question whether the idol itself shall be considered the true beneficiary subject to a charge in favour of the heirs or specified relatives of the testator for their upkeep, or whether on the other hand these heirs shall be considered the true beneficiaries subject to a charge for the upkeep, worship and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will.

48 Ind. App. 143 Relied on. (BHAGWATI J.)

Sree Sree Ishwar Sridhar Jew v. *Sushila Bala*, (*ibid.*)

REQUISITION OF LAND (CONTINUANCE OF POWERS) ORDINANCE, 1946, **cl. 3.**

The express provisions of cl. 3 of the Ordinance cover all cases of immoveable properties which on 30-9-46 were subject to "any" requisition effected under the Defence of India Act, 1939, and the rules thereunder, whether the requisition was effected for a limited duration or for an indefinite period. Hence, not only does cl. 3 cover those requisition orders which would have ceased to be operative with the expiration of the Act but also those orders which by reason of the limitation of the duration of the requisition expire *ipso facto* on the date of the expiration of the Act. Therefore even a requisition order of the latter class will be continued until the expiry of the Ordinance. (BHAGWATI J.)

Dominion of India v. *Shrinbai A. Irani*, 1954 SC 596 : 1955 (1) SCR 305 : 1954 SCJ 644 : 1954 SCA 993 : (1955) Mysore 279.

RES JUDICATA—**Competency of former Court.**

The doctrine of *Res Judicata* is based on general principles of jurisprudence. The condition regarding the competency of the former Court to try the subsequent suit is one of the limitations engrafted on the general rule of *Res Judicata* by S. 11 of the Civil Procedure Code and has application to suits alone. When the plea of *Res Judicata* is based on general principles of law, all that is necessary to establish is that the Court that heard and decided the former case was a Court of competent jurisdiction. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the latter suit. A plea of *Res Judicata* on general principles can be successfully taken in respect of judgments of Courts of exclusive jurisdiction, like Revenue Courts, Land Acquisition Courts, administration courts etc. It is obvious that these courts are not entitled to try regular suits and they only exercise special jurisdiction conferred on them by the statute. (MAHAJAN J.)

Rajalakshmi Dassi v. *Banamali Sen*, 1953 SC 33 : 1953 SCR 154 : 8 DLR SC 75 : 1952 SCJ 618 : 1953 SCA 22.

Identity of subject matter.

Even in cases where the plea of *Res Judicata* is founded on general principles of law it is not necessary that the subject matter in the two cases should be identical.

The test of *Res Judicata* is the identity of title in the two litigations and not the identity of the actual property involved in the two cases. (MAHAJAN J.)

Rajalakshmi Dassi v. *Banamali Sen*, (*ibid.*)

Effect of grant of letters of administration.

A person executed an agreement in favour of another to pay monthly maintenance on condition that the latter should execute a will in his favour. The will was executed but the maintenance was not paid. On the death of the testator, the legatee applied for letters of administration which were, after contest by the heirs of the testator, granted. In a subsequent suit between them, *held*, the question of *animus testandi* of the testator was barred by *res judicata* by virtue of the grant of letters of administration but that the question whether under the will the vesting of the legacy was conditional on the due payment of the maintenance was not so barred and could be agitated.

1946 Oudh 193 Affirmed. (BHAGWATI J.)

Raj Rani v. *Dwarkanath Singh*, 1953 SC 205 : 1953 SCR 913 : 1953 SCJ 234 : 8 DLR SC 283 : (1953) 2 All 716.

SALE OF GOODS ACT, 1933, **S. 23—F. O. B. Contract.**

Placing of the goods on board the steamer named by the buyer under an F.O.B. contract clearly discharges the contractual liability of the seller as a seller and the delivery to the buyer is complete and the goods may thenceforward be also at the risk of the buyer against which he may cover himself by taking out an insurance. *Prima facie* such delivery of the goods to the buyer and the passing of the risk in respect of the goods from the seller to the buyer are strong indications as to the passing also of the property in the goods to the buyer but they are not decisive and may be negatived under Sec. 25 of the Act. (S. R. DAS J.)

Commissioner of Income-tax, Madras v. *Mysore Chromite Ltd.*, 1955 SCR 849 : 1955 SC 98 : 1955 SCA 627 : 1955 SCJ 185 : 1955 (27) ITR 128 : 1955 (1) MLJ 98 : 1955 Andh WR 98.

S. 30 (2)—transfer of possession induced by frand.

Though obtaining possession of goods by false pretences does not exclude the operation of S. 30 (2), the position is different if the fraud committed is of such a character as would prevent there being consent at all on the part of the owner to give possession of the goods to a particular person. Thus if A obtains possession by falsely representing himself to be B the so-called consent of the owner not being real consent is a totally void thing in law.

When the transfer of possession is voidable merely by reason of its being induced by fraud, which can be rescinded at the option of the owner, the consent which followed the false representation is sufficient consent within the meaning of S. 30 (2) if at the time the possessory right has not actually been defeated. It would not make any difference in the application of the principle if the fraud or deception practised by a person in obtaining possession from the owner is of such a character as to make him guilty of a criminal offence. In other words when the consent is in fact given by the owner, it is immaterial that the receiver was guilty of larceny by trick. (MUKHERJEA J.)

Central National Bank Ltd. v. *United Industrial Bank Ltd.*, 1954 SC 181 : 1954 SCR 391 : 1954 SCJ 54 : 1954 SCA 1133 : 94 CLJ 1 : 9 DLR SC 68 : 1954 (1) MLJ 87 : 1954 MWN 191.

Sale of goods—Works contract—liability for sales tax.

The expression sale of goods used in entry 48 List 2, Government of India Act, 1935 (and Constitution of India entry 54, List 2 Schedule 7) is a *nomen juris*, its essential ingredient being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is one, entire and indivisible, and that is its norm, there is no sale of goods and the State Legislature cannot impose sales tax on the supply of the materials used in such a contract treating it as a sale.

1954 Madras 1130 Affirmed ; 1956 Hyd 79 Approved ; 1957 Kerala 146, 1955 Mys 41, 1957 Raj 104 & (1955) 6 STC 93 Overruled.

(VENKATARAMA IYER J.)

State of Madras v. *Gannon Dunkerly & Co., Ltd.*, 1958 SC 560 : 1959 SCR 379 : 1958 SCA 692 : 1958 SCJ 696 : 1958 (9) STC 353 : 1958 (2) MLJ 66 : 1958 (2) An WR 66.

SEA CUSTOMS ACT, 1878—**authorities—whether judicial tribunal.**

The Sea Customs authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the Act do not constitute a judgment or order of a Court or judicial tribunal and therefore such adjudication cannot be pleaded under Art. 20 (2) of the Constitution as a bar to a prosecution under S. 23 of the Foreign Exchange Regulation Act, 1947. (BHAGWATI J.)

Maqbool Hussain v. *State of Bombay*, 1953 SCR 730 : 1953 SC 325 : 1953 SCJ 456 : 1953 SCA 641 : 8 DLR SC 365 : 56 Bom LR 13 : 1953 (2) MLJ 113 : 1953 MWN 648 : 54 Cr LJ 1432.

SHOLAPUR SPINNING AND WEAVING CO. (EMERGENCY PROVISIONS) ORDINANCE, 1950 AND SHOLAPUR SPINNING AND WEAVING CO. (EMERGENCY PROVISIONS) ACT, 1950—**Constitutional validity.**

The Ordinance and the Act authorise in effect a deprivation of the property of the company within the meaning of Art. 31 of the Constitution and are not covered by clause 5 (b) (ii) of that Article. Thus they violate the fundamental right of the company under Art 31 (2) and a preference shareholder who is called upon to pay monies unpaid on his shares by virtue of the Ordinance and the Act, is entitled to impugn their constitutionality.

1950 SCR 869 Distinguished ; 1951 Bombay 86 Reversed.

(PATANJALI SASTRI C. J.)

Dwarkadas Shrinivas v. *Sholapur Spinning and Weaving Co.*, 1954 SC 119 : 1954 SCR 674 : 1954 SCJ 115 : 1954 SCA 132 : 9 DLR SC 187 : 56 Bom LR 681 : 1954 (1) MLJ 355 : 67 LW 176.

SLUM AREAS IMPROVEMENT AND CLEARANCE ACT, 1956 **S. 19—validity.**

The section does not offend Article 14 or 19 (1) (f) of the Constitution.

(RAJAGOPALA IYENGAR J.)

Jyoti Pershad v. *Administrator of the Union Territory of Delhi*, 1961 SC 1602.

Scope.

The provisions of the Act, which is a special enactment, will in respect of buildings in areas declared slum areas operate in addition to the Rent Control

Legislation in the area. The argument that the Act is inapplicable to buildings covered by the Rent Control Legislation in any area is without substance particularly when it is seen that it is only when a decree for eviction is obtained S 19 of the Act comes into play. (RAJAGOPALA IYENGAR J.)

Jyoti Pershad v. *Administrator of the Union Territory of Delhi*, (*ibid.*).

SOLDIERS (LITIGATION) ACT, 1925, **S. 11—extent of privilege.**

The privilege of an extended period of limitation is a personal one and another person (who may have a joint cause of action with the plaintiff) cannot take advantage of it. (BOSE J.)

Kura v. *Jagram*, 1954 SC 269 : (1954) Patiala 82.

SOVEREIGN GRANT—**revocation**

A grant of a village made by the Ruler of an independent Indian State (before accession) to his subject cannot after the State merged in the Indian Union, be revoked as an Act of State by the Government of the State into which the village was absorbed subsequent to the accession. In such a case Art 31 (1) of the Constitution will be attracted. (BOSE J.)

Virendra Singh v. *State of Uttar Pradesh*, 1954 SC 447 : 1955 SCR 415 : 1954 SCJ 705 : 1954 SCA 686 : 1954 (2) MLJ 369.

SPECIFIC PERFORMANCE—**Agreement to lease—Discretion of Court.**

In a suit for specific performance of an agreement to lease when there are only a few months left before the unexpired portion of the lease would run out and when the plaintiff does not have an option of renewal as a matter of right, the Court in its discretion may decline to grant specific performance of the contract for the short period but there is no reason why the plaintiff should be deprived of compensation. (GHULAM HASAN J.)

Kalyanpur Lime Works v. *State of Bihar*, 1954 SC 165 : 1954 SCR 958 : 1954 SCJ 99 : 1954 SCA 278 : 9 DLR SC 211 : 1954 (1) MLJ 305.

SPECIFIC RELIEF ACT, 1877

S. 12—agreement to assign lease.

Where a lease provided that the lessee had covenanted not to assign his interest except with the consent of the lessor which was not to be unreasonably withheld by him, and the lessee had agreed to assign the lease and the proposed assignee sued for specific performance, *held*, the objection as to want of consent from the lessor was one which could be availed of by the assignee to rescind the contract but could not be pleaded by the lessee as relieving him from the obligation of performing his part of the agreement, if the assignee waived the objection and insisted on specific performance. (S. R. DAS J.)

Kamalaranjan v. *Baijnath*, 1950 SCR 840 : 1951 SC 1 : 1951 SCJ 13 : 6 DLR SC 68 : 1951 MWN 361 : 64 LW 341 : BLR 1951 SC 6.

S. 15—Relinquishment.

Relinquishment of the claim to further performance can be made at any stage of the litigation.

11 Lah. 69 Approved. (GHULAM HASAN J.)

Kalyanpur Lime Works v. *State of Bihar*, 1954 SC 165 : 1954 SCR 958 : 1954 SCJ 99 : 1954 SCA 278 : 9 DLR SC 211 : 1954 (1) MLJ 305.

Ss. 18 (a) and 15—grant of relief.

An agreement to lease was entered into during the currency of a prior lease after the expiry of which the plaintiff sued for specific performance. *Held* that although the defendant was not in a position to grant a lease from the time he agreed to do, the prior lease having expired and a suit for specific performance not being barred the plaintiff was entitled to sue for the relief and that S. 18 (a) was applicable.

Held also that as a substantial portion of the period had already expired, and the plaintiff had relinquished his claim to further performance, which relinquishment could be made at any stage of the litigation, relief could be given under S. 15.

(GHULAM HASAN J.)

Kalyanpur Lime Works v. *State of Bihar*, (*ibid.*)

S. 27 (b)—Subsequent transferee—Equities.

It will not be right to lay down a rule that in every case the balance of purchase money should be paid to the subsequent transferee upto the extent of the consideration paid by him. There may be equities between the vendor and the subsequent transferee which would make that improper ; so unless they fight the question out as between themselves and it is decided as an issue in the case the normal rule should be to require that the money be paid to the vendor.

Where the circumstances are such that it would be inequitable to leave the subsequent transferee to pursue his remedy against the vendor, the Court has a wide discretion in the matter of an equitable relief to direct payment to the subsequent transferee. (BOSE J.)

Durga Prasad v. *Deep Chand*, 1954 SC 75 : 1954 SCR 360 : 1954 SCJ 23 : 1954 SCA 934 : 9 DLR SC 77 : 1954 ALJ 73 : 67 LW 945 : 1954 (1) MLJ 60 : 1954 MWN 222 : 2 BLJ 213.

Form of decree.

The proper form of decree to be passed in a suit for specific performance against the vendor and a subsequent transferee with notice is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor. All that he does is to pass on his title to the plaintiff.

1931 Cal. 67 Approved ; 1932 All. 694 Not Approved. (BOSE J.)

Durga Prasad v. *Deep Chand*, (*ibid.*)

S. 27-A—Agreement to lease—section not retrospective.

In the cases of lease the Legislature has recognised that the equity of part performance is an active equity as in English Law sufficient to support an independent action by a plaintiff. This section does not, however, apply to contracts executed before the 1st April, 1930, though in such a case the defence under S. 53A, Transfer of Property Act is available. (MAHAJAN J.)

Maneklal Mansukhbai v. *Ginwalla*, 1950 SCR 75 : 1950 SC 1 : 1950 SCJ 317 : 63 LW 495 : 52 Bom LR 521 : 1950 RLW 117 :1950 (2) MLJ 344 : 5 DLR SC 11.

S. 42—injunction—whether consequential relief.

A suit for a declaration with consequential relief for injuction is not a suit for declaration *simpliciter* ; it is a suit for declaration with further relief. Whether the further relief claimed in a particular case as consequential upon a declaration is adequate must always depend upon the facts and circumstances of the case.

28 Bom. 567 Ref. to ; 1953 Madras 445 Affirmed. (SHAH J.)

Mohamed Yunus v. *Syed Unnissa*, 1961 SC 808.

S. 42, Proviso—Omission to ask for consequential relief—practice—plea in appeal.

It is a well settled rule of practice not to dismiss a suit automatically but to allow the plaintiff to make the necessary amendment asking for further relief, if he seeks to do so. Where, therefore, the plea of the bar under the Proviso is not raised in the trial Court, when the plaintiff could have asked for the necessary amendment, it cannot be allowed to be raised in the Supreme Court.

Rukhma Bai v. *Laxminarayan*, 1960 SC 335 : 1960 (2) SCR 253 : 1960 SCJ 433 : 1960 (1) SCA 624.

Objection when to be considered.

For the purpose of deciding whether a memorandum of appeal is properly stamped according to the subject matter of the appeal it is not open to the Court to canvass the question whether the suit, which was originally instituted for a declaration and for consequential relief, with the prayer for consequential relief eliminated from it fell within the mischief of the proviso to S. 42. That is a question which relates to the merits of the appeal and does not concern its proper institution. (MAHAJAN J.)

Nemichand v. *Edward Mills Co., Ltd.*, 1953 SC 28 : 1953 SCR 197 : 1952 SCJ 674 : 1952 SCA 817 : 8 DLR SC 28 : 1953 ALJ 136 : 1953 AWR 131 : 1953 (1) MLJ 117 : 66 LW 605 : 1 BLJ 115

S. 45—"under any law".

The provision is a beneficent one to compel performance of public duties, intended to open up a swift and summary remedy to the subject against, on the one hand, certain kinds of abuse or excesses by public officers and on the other, laziness or incompetence on their part. There is no reason why statutory duties should be placed differently from other duties enjoined by any other kind of law, especially as some statutory duties are slight or trivial when compared to certain other kinds of duties not referable to a statutory provision. The words "any law" are wide enough to embrace all kinds of law. (BOSE J.)

Commissioner of Police, Bombay v. *Gordhandas Bhanji*, 1952 SC 16 : 1952 SCR 135 : 1951 SCJ 803 : BLR 1952 SC 56 : 65 LW 212 : 54 Bom LR 383 : 7 DLR SC 112 : 1952 SCA 53.

Absence of other specific and adequate remedy.

The facts that the alternative remedy , *viz.*, a suit against the public officer, would require a notice under S. 80 C. P. C. importing delay, the long drawn out procedure of Civil litigation with its concomitant appeals might spell ruin to the

subject, large sums of money will remain tied up so long as the matter remains in abeyance, the cost of the applicant's project is constantly rising and that business rivals are all the while acquiring goodwill and reputation were when considered cumulatively held to be enough to fulfil the requirement of S. 45 that the applicant should have no other adequate remedy.

Commissioner of Police, Bombay v. *Gordhandas Bhanji*, (*ibid.*)

The dangerous course of ignoring an official order at one's peril is not the kind of adequate and specific legal remedy contemplated under S. 45. (BOSE J.)

Commissioner of Police, Bombay v. *Gordhandas Bhanji*, (*ibid.*)

Discretion.

A discretion vested in a public authority for public reasons is coupled with a duty to exercise it when the circumstances so demand. It cannot be shirked, shelved or evaded and performance of it can be compelled under S. 45. (BOSE J.)

(In the instant case, the Commissioner of Police in whom the rules made under the City of Bombay Police Act vested an absolute discretion to cancel a licence already granted for the erection of a cinema building and who merely intimated an order of cancellation made by another authority, *viz.*, the State Government which had no power to do so, was directed to bring to bear his own judgment on the subject and to issue a definite and unambiguous order of either cancelling or refusing to cancel the licence.)

Commissioner of Police, Bombay v. *Gordhandas Bhanji*, (*ibid.*)

S. 46—demand and denial.

The demand and denial required by S. 46 are matters of substance and not form. An evasion or a shelving of a demand for justice is sufficient to operate as denial. In England the refusal need not be in so many words. All that is necessary is to show that the party complained against has distinctly determined not to do what is demanded. In the United States a demand is not required where it is manifest that it would be but an idle ceremony. The law in India is not different except that there must be a demand and a denial in substance though neither need be made in so many words. (BOSE J.)

Commissioner of Police, Bombay v. *Gordhandas Bhanji*, (*ibid.*)

S. 54—Injunction.

Where according to the terms of the lease of a brick field bricks and other materials left in the land by the lessee after the expiry of a certain period from the termination of the lease were to belong to the lessor, *held*, an injunction could be granted restraining the lessee from removing bricks, tiles and other such manufactured articles, but not the boilers, engines, trucks, kilns etc.

(FAZL ALI J.)

Karnani Industrial Bank v. *Province of Bengal*, 1951 SC 285 : 64 LW 977 : 1951 SCR 560 : BLR 1951 SC 254 : 1952 SCA 1 : 1951 SCJ 407 : 1951 ALJ 625 : 89 CLJ 62.

STAMP ACT, 1899

S. 5—"distinct matters"—power of attorney.

The word "matter" in S. 5 was not intended to convey the same meaning as the word "description" in S. 6. The expressions have different connotations.

S. 6 deals with a single transaction which might be viewed as falling under more than one category, whereas S. 5 applies only when the instrument comprises more than one transaction, and it is immaterial for this purpose whether those transactions are of the same category or of different categories.

Whether a power-of-attorney relates to a single matter or to distinct matters will depend on a number of factors such as who are parties thereto, which is the subject matter on which it operates and so forth.

It is settled law that when two persons join in executing a power-of-attorney, whether it comprises distinct matters or not will depend on whether the interests of the executants in the subject matter of the power are separate or joint. Conversely, if one person holding properties in two different capacities each unconnected with the other, executes a power in respect of both of them, the instrument should logically be held to comprise distinct matters.

When a person possesses both a personal capacity and a representative capacity, such as trustee, executor, administrator, managing director or liquidator of a company, and there is a delegation of power by him in both those capacities the position in law is exactly the same as if different persons join in executing a power in respect of matters which are unrelated. There being no community of interest between the personal estate belonging to the executant and the trust or other estate vested in him, they must be held to be "distinct matters" for purposes of S. 5. Therefore stamp duty is payable on a power-of-attoney for as many respective capacities as the principal executes the power and the instrument is chargeable with the aggregate amount of duty payable if separate instruments were executed in respect of each of those capacities.

1952 Cal. 815 Reversed. (VENKATARAMA IYER J.)

Member, Board of Revenue v. *Arthur Paul Benthal*, 1955 (2) SCR 842 : 1956 SC 35 : 1956 SCJ 56 : 1956 SCA 512 : 1956 (1) MLJ 43 : 69 LW 865.

Ss. 31 & 33—Document brought for opinion of Collector—whether can be impounded.

The scheme of the Act shows that where a person simply seeks the opinion of the Collector as to the proper duty in regard to an instrument, he approaches the Collector under S. 31. If it is not properly stamped and the person wants to proceed with effectuating the document or using it for the purposes of evidence, he is to make up the duty and under S. 32 the Collector makes the endorsement. But if the person does not want to proceed any further than seeking the determination of the duty payable then no consequence will follow and after the determination of the duty the Collector becomes *functus officio* and S. 33 can have no application. In this respect an executed instrument is in the same position as an instrument which is unexecuted and unstamped.

Hence where an executed instrument is brought to the Collector under S. 31 for determination of the duty payable thereon, the Collector, after determination of the duty with which the instrument is chargeable, cannot impound the same under the provisions of S. 33.

Observations in 59 Cal. 1171 held *obiter* ; 1956 All. 453 (FB) Affirmed. (KAPUR J.)

Government of Uttar Pradesh v. *Mohamed Amir*, 1961 SC 787.

S. 36—"admitted in evidence."

Where a question as to the admissibility of a document is raised on the ground that it has not been duly stamped, it has to be decided then and there when the document is tendered in evidence. Once the court rightly or wrongly decides to admit it in evidence, so far as the parties are concerned, the matter is closed.

S. 36 is in the nature of a penal provision and has far-reaching effects and admits of no exceptions other than that contemplated by S. 61. Parties to a litigation, where such a controversy is raised, have to be circumspect and the party challenging the admissibility has to be alert to see that the document is not admitted in evidence by the court. The Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case.

A hundi, not duly stamped, was marked as an exhibit in a suit and bore the endorsement "admitted in evidence" under the signature of the Court and the trial had proceeded on the footing that it was an exhibit in the case and had been used by the parties in examination and cross examination of their witnesses. The trial Court had held that S. 36 came into play and decreed the suit. The High Court, on appeal, held that the admission of the document was "a pure mistake" and allowed the appeal.

On appeal by the plaintiff, *held* (allowing the appeal),

It was not one of those cases where a document had been inadvertently admitted without the Court applying its mind to the question of admissibility and therefore S. 36 came into operation and the High Court was in error in refusing to act upon the document.

1957 Raj. 47 Reversed. (SIHHA C. J.)

Javerchand v. *Pukraj Surana*, 1961 SC 1655.

Objection to admission of document by the lower court at the appellate stage.

Where the document has been admitted in evidence by the lower court, such admission cannot be called in question at any stage of the proceedings on the ground that it has not been duly stamped. Sec. 36 precludes the parties from raising any objection against the admission of the document at the appellate stage. (BHAGWATI J.)

Annamalai Chettiar v. *Veerappa Chettiar*, 1956 SC 12.

S. 57—Power of High Court.

The power to make a reference is not only for the benefit of the Revenue Authority but enures also for the party affected by the assessment. This power is coupled with a duty on the Revenue Authority as a public officer to do the right thing. When an important and intricate question of law in respect of the construction of a document arises, it is his duty to make a reference. If he omits to do so, the High Court has power to direct him to discharge that duty and to make a reference.

1948 Bom 254 Affirmed.

The argument that the proceedings had gone beyond the stage of assessment and had reached the stage of enforcing payment is irrelevant. (KANIA C. J.)

Chief Controlling Revenue Authority v. *Maharashtra Sugar Mills*, 1950 SCR 536 : 1950 SC 218 : 1950 SCJ 444 : 64 LW 4 : 5 DLR SC 82 : 1950 MWN 740 : 52 Bom LR 769 : 1950 (2) MLJ 564.

SUCCESSION ACT, 1925

S. 61—Burden of proof of undue influence.

When once it has been proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent,

the burden of proving that it was executed under undue influence is on the party who alleges it.

1857 (6) HLC 2 Relied on. (VENKATARAMA IYER J.)

Naresh Charan Das v. *Paresh Charan Das*, 1955 SCR 1035 : 1955 SC 363 : 1955 SCA 360 : 1955 SCJ 293 : 1955 (1) MWN 416.

Undue influence—what is.

It is elementary law that it is not every influence which is brought to bear on a testator that can be characterised as 'undue.' It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. If the testator retains his mental capacity, and there is no element of fraud or coercion, the will cannot be attacked on the ground of undue influence.

(1868) 1 P & D 481 Relied on. (VENKATARAMA IYER J.)

Naresh Charan Das v. *Paresh Charan Das*, (*ibid.*)

S. 63—Proof of attestation.

It cannot be laid down as a matter of law that because the attestor witness did not state in examination-in-chief that he signed the will in the presence of the testator, there was no due attestation, It will depend on the circumstances elicited in evidence whether the attesting witnesses signed in the presence of the testator. This is a pure question of fact depending on appreciation of evidence.

On facts (1952) 2 Cal. 56 Affirmed. (VENKATARAMA IYER J.)

Naresh Charan Das v. *Paresh Charan Das*, (*ibid*).

S. 89—selection by legatee.

The provision of the section applies only to those cases where a will is so indefinite that it is not possible to give any definite intention to it at all. But there may be wills which use words which are not so uncertain that a definite intention cannot be ascribed to the testator under those words. In cases where the testator has not indicated the selection himself and has not nominated a third person to make the selection but still the gift is not so uncertain as to be void, the English Courts have evolved the benevolent rule that the testator intended to give the selection to the legatee and once the selection is made by the legatee, the will takes effect. This English rule of construction should be applied in India also.

18 Mad. 460 Approved ; 1956 Mad. 521 Affirmed.

Where the area of certain kind of land owned by the testator in a village was more than that bequeathed by him,

Held, the testator must be deemed to have intended that the legatee would select the land devised from out of the lands owned by the testator and that therefore the legatee was entitled so to select. (WANCHOO J.)

Balakrishnan v. *Mahalakshmi Ammal*, 1961 SC 1128.

Ss. 113 and 115—interest in favour of unborn person.

It is true that no interest can be created in favour of an unborn person but when the gift is made to a class or series of persons some of whom are in existence and some are not, it does not fail in its entirety ; it is valid with regard to the persons who are in existence at the time of the testator's death and is invalid as to the rest. (MUKHERJEA J.)

Bajrang Bahadur Singh v. *Thakuram Bakhtraj Kuer*, 1953 SC 7 : 1953 SCR 232 : 1952 SCJ 655 : 1953 SCA 369 : 8 DLR SC 71 : 1953 ALJ 49 : 1953 AWR 85 : 1953 (1) MLJ 108 : (1953) 1 All 896.

S. 128—Condition precedent.

A person executed an agreement in favour of another in view of the latter proposing to make a bequest to the former. The agreement recited that the former would pay by way of consideration for the making of the will, to the latter monthly maintenance from the date of the execution of will till the death of the latter. The agreement provided that should the testator subsequently revoke the will the amount of maintenance was to be repaid by the testator and that in the event of the maintenance amount not being paid the testator could recover the sum due through Court. The will was executed accordingly but there was nothing in it which by itself made the bequest conditional upon the regular payment of maintenance. The maintenance was not paid but the testator did not revoke the will. On the death of the testator, his heirs sued the legatee that the bequest failed for want of fulfilment of a condition precedent ;

Held, while recognising that the law knows of no words that either in a will or deed necessarily make a condition precedent and that same words may either make a condition precedent or subsequent according to the nature of the thing and the intent of the parties, the terms of the agreement, which itself provided what was to happen if the payment was not made, negatived any such contention and that the vesting of the legacy was not conditional upon the fulfilment of the obligation under the agreement.

Observation in (1739) 125 E.R. 1106 at p. 1108 Referred to ; 1946 Oudh 193 Affirmed. (BHAGWATI J.)

Raj Rani v. *Dwarkanath Singh*, 1953 SC 205 : 1953 SCR 913 : 1953 SCJ 234 : 8 DLR SC 283 : (1953) 2 All 716.

Ss. 129 and 130—Applicability.

The applicability of either S. 129 or S. 130, will depend upon whether there is in the will a substitutional bequest which is to take effect on the failure of a prior bequest. If there is no substitutional bequest then neither of the two sections can come into play. (S. R. DAS C. J.)

Shirinbai v. *Nargacebai*, 1956 SCR 591 : 1956 SC 747 : 1956 SCA 1069 : 1956 SCJ 704 : 1956 SCC 440 : 1957 All WR 29 : (1956) 2 All 681 : 1956 (2) MLJ 67 : 70 LW 1 : 1957 ALJ 99.

S. 222—duty of Probate Court.

The Probate Court is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had a sound disposing state of mind. The question whether a particular bequest is good or bad in law is not within its purview and therefore an application for probate cannot be dismissed on the ground that a certain disposition is void for uncertainty. (S. R. DAS J.)

Ishwardeo Narain Singh v. *Kamta Devi*, 1954 SC 280 : 1953 ALJ 691 : 1 BLJ 690.

S. 263 (a)—discretion of Court.

'Defective in substance' must mean that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings.

The omission to issue citations to persons who should have been apprised of the probate proceedings may well be in a normal case a ground by itself for revocation of the grant. But this is not an absolute right irrespective of other considerations arising from the proved facts of a case. The law has vested a judicial discretion in the court to revoke a grant where the Court may have *prima facie* reasons to believe that it was necessary to have the will proved afresh in the presence of interested parties.

The annulment is a matter of substance and not of mere form. The Court may refuse to grant annulment in cases where there is no likelihood of proof being offered that the will admitted to probate was either not genuine or had not been validly executed. (SINHA J.)

Anil Behari Ghosh v. *Latika Bala Dasi*, 1955 (2) SCR 270 : 1955 SC 566 : 1955 SCA 1026 : 1955 SCJ 578 : 1955 (2) MLJ 84 : 1955 MWN 852.

Cl. (e)—accounts.

The omission to submit accounts is not always synonymous with 'wilfully and without reasonable cause' omitting to exhibit accounts. (SINHA J.)

Anil Behari Ghosh v. *Latika Bala Dasi*, (*ibid.*)

Ill. (iii)—Revocation.

The section also contemplates a case for revocation based on the single ground that the will in respect of which the grant in question was obtained was a forged one. (SINHA J.)

Anil Behari Ghosh v. *Latika Bala Dasi*, (*ibid.*)

Where a person had executed a registered will and had not taken during his lifetime any tangible steps to revoke such a will, it is not enough, in an application for revocation of probate once granted to allege that the testator had at one time entertained the intention of doing so, because such an intention without being translated into action has no effect on the will actually left by him.

(SINHA J.)

Anil Behari Ghosh v. *Latika Bala Dasi*, (*ibid.*)

SUITS VALUATION ACT, 1887, **S. 8—value.**

The section provides that in certain specified suits the value determinable for computation of court fees and the value for the purposes of jurisdiction shall be the same. The effect is to make the value for the purpose of jurisdiction dependent upon the value determinable for computation of court fees and not *vice versa*. Where in such a suit the plaintiff is entitled to fix his own valuation of the suit for purposes of court fees and he exercises his option and values his claim that determines the value for jurisdiction also. Hence if in such a suit the plaintiff merely states the value for jurisdiction and not for court fees it will be unreasonable to hold him bound by that valuation and infer that such valuation should also be taken as the valuation for purposes of court fees but liberty should be given to him to amend the plaint and specifically state the amount at which he seeks to value his claim for payment of court fee and such value will determine the value for jurisdiction also. (GAJENDRAGADKAR J.)

Sathappa Chettiar v. *Ramanathan Chettiar*, 1958 SCR 1021 : 1958 SC 245 : 1958 SCJ 407 : 1958 (1) MLJ 148 : 1958 (1) An WR 148.

S. 11—Principle.

The principle underlying S. 11 of the Suits Valuation Act and sections 21 and 99 of the C.P.C. is the same, namely that when a case has been tried by a court on the merits and judgment rendered it should not be liable to be reversed purely on technical grounds unless it had resulted in failure of justice.
(VENKATARAMA IYER J.)

Kiran Singh v. *Chaman Paswan*, 1954 SC 340 : 1955 (1) SCR 117 : 1954 SCJ 514 : 1954 SCA 725 : 1954 Andh LJ SC 68 : 1954 ALJ 551 : 1954 (2) MLJ 60 : 1954 MWN 545 : 2 BLJ 426.

Prejudice—what is.

The prejudice contemplated by the section is something different from the fact of an appeal having been heard in a forum which would not have been competent to hear it on a correct valuation of the suit as ultimately determined.

46 Mad. 631 (FB), 55 All 315 (FB) and 27 Patna 1091 (FB) Approved.
(VENKATARAMA IYER J.)

Kiran Singh v. *Chaman Paswan*, (*ibid.*)

Nature of jurisdiction under.

The jurisdiction conferred on Appellate Courts under this section is an equitable one to be exercised when there has been an erroneous assumption of jurisdiction by a subordinate court as a result of overvaluation or undervaluation and a consequential failure of justice. It is neither possible nor even desirable to define such a jurisdiction closely or confine it within stated bounds. It can only be predicated of it that it is in the nature of revisional jurisdiction to be exercised with caution and for the ends of justice whenever the facts and the situation call for it. Whether there has been prejudice or not is accordingly a matter to be determined on the facts of each case. (VENKATARAMA IYER J.)

Kiran Singh v. *Chaman Paswan*, (*ibid.*)

Erroneous findings—whether prejudice.

An Appellate Court has no power under S. 11 to consider whether the findings of fact recorded by the lower appellate court are correct. Any error in those findings cannot be held to be prejudice within the meaning of the section.
(VENKATARAMA IYER J.)

Kiran Singh v. *Chaman Paswan*, (*ibid.*)

Plaintiffs filed a suit in the Court of the Subordinate Judge valuing the suit at Rs. 2,950. The suit having been dismissed, they preferred an appeal on the same valuation to the District Court. That appeal also having been dismissed, they preferred a second appeal before the High Court. On an objection taken by the Stamp Reporter, the High Court determined the correct value of the suit at Rs. 9,980. The appellants paid the additional court fees and contended that, as on the revised valuation the first appeal would lie to the High Court and not to the District Court, their second appeal should be heard as a first appeal ; the High Court negatived the contention as no prejudice had been caused to the appellants. The plaintiffs appealed.

Held, dismissing the appeal, that prejudice can be a ground for relief only when it is due to the action of another party and not when it results from one's own act, plaintiffs who initiated proceedings in a Court of their own choice could

not subsequently turn round and question its jurisdiction on the ground of an error in valuation which was their own and, as on facts no prejudice was shown to have resulted, there were no grounds for interference under S. 11.

(VENKATARAMA IYER J.)

Kiran Singh v. *Chaman Paswan*, (*ibid.*)

SUPREME COURT ADVOCATES (PRACTICE IN HIGH COURTS) ACT, 1952, **S. 2—acting on Original Side of High Court.**

In the absence of any reservation in S. 2 as in S. 14 of the Indian Bar Councils Act, the statutory right of a Supreme Court Advocate to plead as well as to act in the High Courts at Calcutta and Bombay in the exercise of their original jurisdiction cannot be taken away or curtailed by those Courts and any rules which they may have made in the past purporting to exclude any Advocate from acting on their original side or from appearing and pleading unless he is instructed by an Attorney cannot affect such right.

1952 Cal. 178 (S.B.) Reversed ; 1928 Mad. 1182 (FB) Approved.

The word "practise" as applied to an Advocate in India includes both the functions of acting and pleading and there is nothing in section 2 to warrant the cutting down of that statutory right to pleading only on the original side of the Calcutta High Court (and the Bombay High Court).

(PATANJALI SASTRI C. J.)

Aswini Kumar Ghosh v. *Arabinda Bose*, 1952 SC 369 : 1952 SCJ 568 : 1953 SCR 1 : 1952 SCA 683 : 8 DLR SC 92.

SUPREME COURT—PRACTICE—**Finding of fact.**

The Supreme Court will not disturb concurrent findings of fact by the trial court and the first Appellate Court where the finding is largely based on oral evidence. (FAZL ALI J.)

Gur Narain Das v. *Gur Tahal Das*, 1952 SCR 869 : 1952 SC 225.

In an appeal by special leave the Supreme Court will accept concurrent findings of fact arrived at by the Courts below where the findings are not vitiated by any error of law. (SUBBA RAO J.)

Bhinka v. *Charan Singh*, 1959 SC 960 : 1959 Sup (2) SCR 798 : 1960 SCJ 892.

Ordinarily the Supreme Court does not go behind the findings of fact by the final Court of facts but it will do so if the conclusion of that Court is based partly on a misreading of the evidence and partly on the non-advertence to important material evidence. (S. R. DAS C. J.)

M. M. B. Catholicos v. *T. Paulo Avira*, 1959 SC 31 : (1958) Ker 1340 : 1958 Ker LT 721 : 1958 KLJ 874.

New plea—validity of statutory notification.

A plea, not raised in the High Court, that a notification issued by virtue of a power conferred by a statutory provision is *ultra vires* the section and inoperative because a certain condition precedent for the issue of such notification was not existent and which plea raises a question of interpretation of the words of the section cannot, apart from the question whether it is open for a Court to go behind

a notification issued under a statutory provision and decide its validity or not, be allowed to be raised for the first time before the Supreme Court in appeal.

Kesari Singh v. *State of Rajasthan*, 1961 SC 432 : 1961 (1) SCJ 254.

New point.

A point not taken in the grounds of appeal will not be entertained at the hearing. (MAHAJAN J.)

Bhupendra Narain Singh Bahadur v. *Bahadur Singh*, 1952 SC 201 : 1952 SCR 782 : 1952 SCJ 269 : BLR 1952 SC 235 : 7 DLR SC 348 : 1953 SCA 143.

New point—question of law.

There is nothing to preclude a question which is purely one of law being re-opened (though abandoned in the court below) before the Supreme Court with its leave, when such a question is one of considerable importance.
(JAGANNADHADAS J.)

State of Madras v. *K. M. Rajagopalan*, 1955 (2) SCR 541 : 1955 SC 817 : 1955 SCA 1331 : 1956 SCJ 19 : 57 Pun LR 532 : 1955 (1) MLJ 12.

A new point whether the contract in question was one for the sale and purchase of securities within the meaning of S. 6 of the Bombay Securities Contracts Control Act, *held*, was open to the appellant, in view of the terms of the contract notes and the admission of the respondent, though it was not raised in the Courts below.
(VENKATARAMA IYER J.)

Jugal Kishore v. *Goolbai Hormusji*, 1955 (2) SCR 857 : 1955 SC 812 : 1956 SCA 499 : 1956 SCJ 64 : 58 Bom LR 486.

A question whether a partnership formed for the purpose of carrying on (non-banking) business which had for its object the acquisition of gain by the individual members thereof is a legal association, or not, it not being registered as a company under the Companies Law for the time being, and whether therefore the members of the partnership can have any remedy against each other for contribution or accounts in respect of those dealings is a pure question of law not requiring the investigation of any facts and therefore can be raised for the first time in appeal before the Supreme Court.

52 Ind. App. 126 and 76 Ind. App. 244 Followed. (S. K. DAS J.)

Badri Prasad v. *Nagarmal*, 1959 SC 559 : 1959 SCJ 394 : 1959 SCA 483 : 29 Com Cas 229.

Question of fact cannot be allowed.

A question of fact which has to be investigated afresh cannot be allowed to be raised for the first time in appeal to the Supreme Court.
(CHANDRASEKHARA IYER J.)

Rameshwar Bhartia v. *State of Assam*, 1953 SCR 126 : 1953 SCA 42 : 7 DLR SC 493 : 1953 AWR (Sup) 1 : 1952 SC 405 : 1952 SCJ 559 : 1953 (1) MLJ 17 : 1953 MWN 343 : 54 Cr LJ 163.

Question as to special custom.

The question whether any special law or custom prevails in a particular area is one of fact and cannot be allowed to be raised for the first time before the Supreme Court. (BHAGWATI J.)

Jagannath Behera v. *Harihar Singh*, 1958 SCR 1067 : 1958 SC 239 : 1958 SCJ 586 : 24 Cut LT 357.

Point conceded in High Court.

The levy of Sales Tax on forward transactions had been held to be *ultra vires*. The assessee filed a petition for a writ of *mandamus* requiring the Government to refund the tax collected under those assessments. The Government categorically stated in the High Court that they did not contend that the assessee ought to have proceeded for the recovery of the amount otherwise than by a petition under Art 226. But in the Supreme Court they contended that a writ petition would not lie for recovering the monies. The Supreme court did not allow them to take the point at that stage.

Sales Tax Officer v. *Kanhaiya Lal*, 1959 SC 135 : 1959 SCJ 53 : 1959 (1) MLJ 35 : (1959) 1 All 32 : 1959 (1) An WR 35 : 1959 SCR 1350.

Respondent, whether can raise new plea.

The respondent before the Supreme Court had not raised a certain issue either in his memorandum of appeal in the High Court or in his case filed in the Supreme Court. The parties had in the trial court waived all pleas other than those on which issues were framed. *Held*, the respondent could not be allowed to raise the point in the Supreme Court. (JAGANNADHADAS J.)

Wali Singh v. *Sohan Singh*, 1954 SC 263.

SUPREME COURT RULES, 1950

Or. IV R. 20—Professional misconduct.

An advocate of the Supreme Court entered into an agreement with his client for his fees in the following terms :

"I (the client) hereby engage you with regard to my claim against B. Out of the recoveries you may take 50 per cent. of the amount recovered. I will give Rs. 200/- personally towards expenses".

Held, the advocate was guilty of professional misconduct, even though a contract of this kind would be legally unobjectionable if no lawyer was involved, for the rigid English rules of champerty and maintenance do not apply in India.

1 NWFP HCR 1, 5 Bom. 258 & 8 Bom. 413 Distinguished. (BOSE J.)

In the matter of G, a Senior Advocate, Supreme Court, 1954 SC 557 : 1955 (1) SCR 490 : 1954 SCJ 631 : 1954 SCA 857 : 1954 ALJ 557 : 56 Bom LR 1220 : 1954 (2) MLJ 206 : 67 LW 772 : 1954 MWN Cr 233 : 2 BLJ 477 : 1954 VLJ 52 : 55 Cr LJ 1410.

R. 30—Principles to be observed.

The principles to be observed in dealing with a summons are as follows :—

1. An order by a High Court against an advocate, both of a High Court and the Supreme Court by way of disciplinary action is not automatically followed by a similar order of the Supreme Court ;

2. But the Supreme Court need not start a fresh enquiry by way of recording evidence over again ;

3. It is enough that the Supreme Court should generally examine the record of the Bar Council of the High Court and take into account the findings of the High Court.

4. The Supreme Court should give the advocate a reasonable opportunity of being heard against the proposed disciplinary action.

5. It is open to the Supreme Court to permit him, in appropriate cases, to adduce such additional evidence as it thinks fit.

6. The Supreme Court, after hearing the Advocate or his legal adviser and if necessary the Attorney General or such other advocate as may be appointed to place the view point of the legal profession generally or of the complainant or aggrieved party if he desires to be heard, may pass such order as it deems proper in its judical discretion.

Proceedings in the Supreme Court under Or. 4 R. 30 should normally be treated as a natural sequel to proceedings in the High Court under the Bar Councils Act. (SINHA J.)

Mr. C. v. *Advocate General of Madras*, 1957 SC 722 : 1957 SCJ 669 : 1957 Cr LJ 1034 : 1957 (2) MLJ 120 : 1957 (2) An WR 120 : 1958 SCA 454.

Enquiry by Chamber Judge.

The Chamber Judge after holding an enquiry in chambers into the alleged misconduct of an advocate, framed charges and issued summons calling upon him to show cause against disciplinary action being taken.

On the validity of the summons being questioned, the Special Bench treated the enquiry in chambers as a preliminary enquiry, heard arguments, reframed the original charges and added a fresh charge, holding that the material at the preliminary enquiry justified the same. *Held*, also, that Or. IV R. 30 did not preclude the Bench from adopting such a course.

In re M., an Advocate, 1957 SCR 811 : 1957 SC 149 : 1957 SCJ 105 : 1957 SCA 229 : 1957 Cr LJ 300 : 1957 All WR (Sup) 34.

Or. IV-A, Rule 24—declaration of touts.

Apart from Art. 145 of the Constitution, the Supreme Court has inherent jurisdiction to regulate its proceedings relating to conduct of persons appearing before it, in and out of court, in so far as such conduct has a bearing on their professional relations and ethics. Therefore Rule 24 of Order IV-A of the Supreme Court Rules regarding the publication of a list of persons proved habitually to act as touts is not *ultra vires*. (SINHA C. J.)

In re Sant Ram, 1960 (3) SCR 499 : 1960 SC 932 : 1961 (1) SCJ 98 : 1961 (1) MLJ 1 : 1961 (1) Andh WR 1.

Or XIII R. 1—condonation of delay.

The reason that the petitioners had to collect money from amongst a large number of petitioners who were interested in the case is not a sufficient ground for condoning the delay in filing the petition for special leave. (SINHA J.)

Banarsidas v. *State of Uttar Pradesh*, 1956 SCR 357 : 1956 SC 520 : 1956 SCA 702 : 1956 SCJ 529 : 1956 ALJ 517 : 1956 BLJR 511 : 1956 SCC 299 : 1956 All WR 421.

Rules 8, 9 and 13—procedure.

The order of the Supreme Court granting special leave by itself under Art. 136 of the Constitution operates as an admission of the appeal as soon as the conditions in the order relating to furnishing of security or making of a deposit are complied with. It is the duty of the High Court to see that security is furnished

or a deposit is made in accordance with the directions of the Supreme Court and these directions are to be found in the order of the Supreme Court which the Registrar is bound to transmit to the High Court under O. 13 R. 8 of the Supreme Court Rules. It is not necessary for the appellant to file afresh a copy of the Supreme Court order or the petition upon which it was made in order that they may form part of the record of the Supreme Court appeal. They would come in the record as soon as they are transmitted by the Registrar in accordance with the rule and would have to be included in the Paper Book when it is printed.

(MUKHERJEA C. J.)

Shiva Jute Baling Ltd. v. *Hindley & Co.*, 1955 (2) SCR 243 : 1955 SC 464 : 1955 SCA 617 : 1955 SCJ 461 : 1955 (2) MLJ 36 : 1955 MWN 941.

Or. XVI Rule 4—Contention not put forward in the lower courts.

The fact that a contention which was open to the appellants was not put forward at any stage prior to the hearing of the appeal in the Supreme Court, will be sufficient ground for declining to entertain it when it is sought to be raised by a supplemental proceeding under Or. 16 R. 4 of the Supreme Court Rules.

(VENKATARAMA IYER J.)

Kanwar Raj v. *Pramod*, 1955 (2) SCR 977 : 1956 SC 105 : 1956 SCA 419 : 1956 SCJ 134 : 58 Bom LR 507.

O. XIX R. 4—Ground not specified in the statement of case.

O.19, Rule 4 provides that the appellant shall not, without the leave of the Court rely at the hearing on any grounds not specified in the statement of case filed by him. There is no rule imposing a corresponding disability on the respondent. Even with regard to the appellant, the Court may, in appropriate cases, give him leave to raise a ground not specified in the statement of case.

(S. R. DAS C. J.)

Sailendra Narayan Deo v. *State of Orissa*, 1956 SCR 72 : 1956 SC 346 : 1956 SCA 870 : 1956 SCJ 449 : 22 Cut LJ 251.

Or. XLI R. 2—intervention by third party.

Under Or. XLI, R. 2 intervention is permitted only to the Attorney General of India and the Advocates-General for the States. In practice, however, the Supreme Court allows a third party to intervene when such third party is a party to some proceedings in the Supreme Court or the High Courts where the same or similar questions are in issue, for the decision of the Supreme Court will conclude the case of the party. (S. R. DAS C. J.)

Mohd. Hanif Quareshi v. *State of Bihar*, 1958 SC 731 : 1958 SCJ 975 : 1958 SCA 783.

Order XLV R. 5—additional evidence.

Though there is no specific provision for admission of additional evidence in appeals in the Supreme Court, Order 45, R. 5 recognises the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent an abuse of the process of Court, which will include power to admit additional evidence for the non-production of which at the initial stage sufficient ground has been made out. (KAPUR J.)

Surinder Kumar v. *Gian Chand*, 1957 SC 875 : 1957 SCJ 159 : 1958 (1) MLJ 74 : 1958 SCR 548 : 1958 SCA 412 : (1958) Punj 312 : 1958 (1) An WR 74.

Subsequent events.

Where a suit by a person claiming to be a legatee under a will is dismissed on the ground that the will was not properly attested and that therefore the plaintiff had no *locus standi* to file the suit and subsequently the plaintiff applies for and obtains probate of the will, the probate granted and sought to be placed as additional evidence before the Supreme Court can be admitted as the probate is a judgment *in rem* and must be presumed to have been obtained in accordance with the procedure prescribed by law, even though the respondent was not a party to the probate proceedings. (KAPUR J.)

Surinder Kumar v. *Gian Chand*, (*ibid.*)

TENANCY LAWS & LAND REFORM ACTS

AJMER LAND AND REVENUE REGULATION, 1877, **Ss. 119, 23 & 24—Jurisdiction of civil court.**

A suit in a Civil Court questioning the factum, validity and legality of an adoption by the widow of a deceased *Istimrardar* which adoption is confirmed by the Central Government under S. 23, is not barred by S. 119.

S. 24 excludes from its operation cases falling under S. 23. Disputes regarding cases falling under S. 23 would go before a Civil Court.

1954 A.M.L.J. 122 Affirmed. (HIDAYATULLAH J.)

Brij Raj Singh v. *Laxman Singh*, 1961 SC 149.

AJMER TENANCY AND LAND RECORDS ACT, 1950, **S. 112—validity.**

S. 112 manifestly infringes the fundamental right guaranteed by Art. 19 (1) (f) of the Constitution and is not saved either by Cl. (5) of Art. 19 or by Art. 31-A and is therefore void. (MAHAJAN J.)

Raghubir Singh v. *Court of Wards, Ajmer*, 1953 SCR 1049 : 1953 SC 373 : 1953 SCJ 505 : 1953 SCA 629 : 8 DLR SC 490 : 1954 MWN 433..

ASSAM STATE ACQUISITION OF ZAMINDARIES ACT, 1951—**Validity.**

The Act is within the legislative competence of the State Legislature. It does not offend Art. 14 of the Constitution and is fully protected by Art. 31-A of the Constitution. (S. R. DAS C. J.)

Bhairebendra Narayan Bhup v. *State of Orissa*, 1956 SCR 303 : 1956 SC 503 : 1956 SCJ 543 : 1956 SCA 736.

BENGAL TENANCY ACT, 1885, **S. 15-Proviso—proof of mutation.**

Like any other disputed fact, the factum of mutation in the landlord's rent roll can be proved by the production of the original rent roll or by its certified copy, if available, and failing those by other secondary proof of mutation.

The plaintiff, a *durpatnidar*, not being in custody or control of the landlord's rent roll, served a requisition on the landlord to produce those documents but they were not produced. Thereupon the plaintiff examined witnesses to prove the mutation and also adduced secondary evidence of the mutation, *viz.*, the order sanctioning mutation and the payment of rent to the superior landlord in pursuance of the sanction of mutation.

Held, in the circumstances, the court was justified in coming to the conclusion that there was the necessary mutation of the plaintiff in the landlord's rent-roll.

1954 Cal. 123 Affirmed. (SINHA J.)

Chandranath Mukherjee v. *Tusharika Debi*, 1958 SCA 646 : 1958 SCJ 874 : 1958 SC 521 : 1959 SCR 226.

Ss. 16 and 15—bar whether absolute.

Section 16, being in the nature of a penal provision, has to be strictly limited to the words contained therein and penalty should not be extended by implication. The section as it stands after the amendment of 1928, does not impose an absolute bar but operates only until the duties imposed upon the plaintiff by S. 15 have been performed.

The plaintiff who succeeded to the estate of a *durpatnidar* sued for arrears of rent in respect of a *se-patni* tenure. Mutation of the plaintiff in the superior landlord's rent-roll had been made only after the period of 6 months as prescribed by S. 15. The defendant pleaded S. 16 as a bar to the suit.

Held, S. 16 had the effect of only delaying the plaintiff's remedy of recovery of arrears of rent by suit so long as he has not done what he is required by S. 15 to do but not absolutely depriving him of his remedy for all times and that the plaintiff was entitled to recover the arrears of rent.

1954 Cal. 123 Affirmed. (SINHA J.)

Chandranath Mukherjee v. *Tusharika Debi*, (*ibid.*)

BIHAR LAND REFORMS ACT, 1950—**Constitutional validity.**

The Act is valid except as regards section 4 (b) and section 23 (f) which are constitutionally void. (*per Curiam*)

State of Bihar v. *Sir Kameshwar Singh*, 1952 SC 252 : 1952 SCR 1020 : 1952 SCJ 354 : 65 LW 527 : 31 Pat 565.

S. 1—*Ghatwali* tenures.

In pith and substance the Act is covered by entry 36 of List II and has no relation to items 1 and 2 of List I of VII Schedule to the Constitution.

The Act relates to acquisition of property and consequently no question of the repeal of Bengal Ghatwali Lands Regulation XXIX of 1854 arises. The Act expressly includes all Ghatwali tenures within its ambit and provides for the vesting of all rights therein absolutely in the State of Bihar on the issue of a notification.

1952 SC 252 Applied. (S. K. DAS J.)

Manmohan Deo v. *State of Bihar*, 1961 SC 189.

S. 2(O)—"person" includes Company.

The word "person" in section 2 (O) includes an incorportated Company. There is not only nothing repugnant in the subject or context of the Act which should prevent the inclusion of a Company in the definition of "proprietor" but also such inclusion is necessary in order to give full effect to the very object of the Act.

1953 Pat. 105 Affirmed. (S. R. DAS J.)

Motipur Zamindari Co., Ltd. v. *State of Bihar*, 1953 SCR 720 : 1953 SC 320 : 1953 SCJ 451 : 1953 SCA 248 : 8 DLR SC 356 : 52 Patna 529.

S. 2 (q), (r)—"Tenure" and "Tenure-holder."

The expressions "tenure" and "tenure-holder" as defined in clauses (q) and (r) of S 2 include both Government and Zamindari Ghatwalis.

34 Pat. 57 Affirmed. (S. K. DAS J.)

Manmohan Deo v. *State of Orissa*, 1961 SC 189.

S. 3—notification with respect to estate situate partly outside the State.

In respect of an estate situate partly in Bihar and partly in West Bengal, a notification under S. 3 was issued by the State Government with respect to the portions situate within the State. It was contended on behalf of the proprietor that portions of the estate had been let out on *patni* leases, each *patni* comprising lands within the State and outside, that that part of the estate within the State could not be severed from the rest and that therefore the notification covering only that portion was invalid ;

Held (negativing the contention), it was only a simple case of apportionment of revenue and also apportionment of the rent and that the necessity for such apportionment could not affect the validity of the notification.

1953 Patna 105 Affirmed. (S. R. DAS J.)

Motipur Zamindari Company Limited v. *State of Bihar*, 1953 SCR 720 : 1953 SC 320 : 1953 SCJ 451 : 1953 SCA 248 : 8 DLR SC 356 : 52 Patna 529.

Ss. 3, 4 (a) & (h)—Land includes buildings.

Under S. 4 (a) it is not only the estate but also buildings of a certain description and other things which vest in the State absolutely on the publication of a notification under S. 3. The words "used primarily as office or cutchery for the collection of rent of such estate" must be read in the light of the provisions of S. 4 (h) where similar words are employed.

These provisions clearly indicate that if any building was used primarily as office or cutchery for the collection of rent and such building had been transferred after 1-1-46, the transfer could be annulled if the circumstances mentioned in S. 4 (h) had been established. The collector is concerned with the use to which the building was put previous to its transfer after 1-1-46. (IMAM J.)

Kamakshya Narain Singh v. *Collector of Hazaribagh*, 1955 (2) SCR 988 : 1956 SC 63 : 1956 SCA 494 : 1956 SCJ 118 : 1956 ALJ 158 : 1956 BLJR 135.

S. 3(1) and S. 4—Notification—effect.

The notification under S. 3 (1) has the statutory effect of divesting the owner of the notified estate of his or her title to the property and of transferring it to and vesting it in the State.

The State is enabled to take possession of the estate and the properties comprised in it by acting under S. 4 but the latter provision does not contemplate any notification but contemplates only executive acts by authorised officers of the State.

1954 Pat 513 Affirmed. (AYYANGAR J.)

State of Bihar v. *Rani Sonbati Kumari*, 1961 SC 221.

S. 4(h)—validity.

S. 4 (h) is protected by Art 31-A of the Constitution. (SUBBA RAO J.)

State of Bihar v. *Umesh Jha*, 1961 BLJR 716.

Power whether arbitrary.

Though the collector is left with absolute power to annul a transfer and to dispossess a person in possession thereunder, S. 4 (h) does direct the collector to give reasonable notice to the parties concerned and to hear them. Such annulment or dispossession which he may order, must be with the previous sanction of the State Government and he is compelled to do so on terms which may appear to him fair and equitable. The power is, therefore, not quite so absolute or arbitrary. (IMAM J.)

Kamakshya Narain Singh v. *Collector of Hazaribagh*, 1955 (2) SCR 988 : 1956 SC 63 : 1956 SCA 494 : 1956 SCJ 118 : 1956 ALJ 158 : 1956 BLJR 135.

The Act being a law for acquisition of estates, the question of it or S. 4 (h) of it imposing any unreasonable restriction on the fundamental rights of a party to realise rent does not arise. In any event the Act including S. 4 (h) is protected by Art. 31-A of the Constitution. (IMAM J.)

Kamakshya Narain Singh v. *Collector of Hazaribagh*, (*ibid.*)

Effect of amendment by the Amending Act of 1959.

The result of the amendment of S. 4 (h) is that in respect of an order already made by the Collector before the Amending Act, the previous sanction obtained would suffice and in respect of an order made after the Amending Act, a subsequent confirmation by the State Government is required. (SUBBA RAO J.)

State of Bihar v. *Umesh Jha*, 1961 BLJR 716.

BIHAR LAND REFORMS (AMENDMENT) ACT, 1959—**Validity.**

The Act in so far as it amends with retrospective effect sections 4 and 6 of the Bihar Land Reforms Act 1950 is within the protection of Art 31-A. It cannot be said that the Act is not a law for acquisition of a right in the "estate" because the right of a proprietor of an estate to hold a *Mela* on his land is a right in the "estate, being appurtenant to his ownership of the land" as also the right of a tenure-holder to hold a *Mela* on land forming part of the tenure.

(DAS GUPTA J.)

State of Bihar v. *Rameshwar Pratap Narain Singh*, 1961 SC 1649.

BIHAR TENANCY ACT, 1855, **Ss. 21 and 5(2) and (3).**

Before a person can claim occupancy rights under S. 21 he must establish that he is a *raiyat* as defined in S. 5 (2) and (3). Where a lessee acquires the right to hold the lands for purposes of cultivation from a mortgagee of the lands and not the mortgagor, he is not a raiyat within the meaning of S. 5 (3) for the mortgagee is neither the owner of the estate nor can, where the lands were under the personal cultivation of the mortgagor at the time they were mortgaged to him, be taken to be a tenure-holder. Nor can the power of the mortgagee under S. 76 (a) of the Transfer of Property Act, to induct tenants in the usual course of management avail the lessee to claim occupancy rights in the land. (VENKATARAMA IYER J.)

Harihar Prasad v. *Deonarain Prasad*, 1956 SCR 1 : 1956 SC 305 : 1956 SCA 316 : 1956 SCJ 279 : 1956 BLJR 306 : 35 Pat 221.

Ss. 103A and 103B and 120 (2)—private lands—burden of proof.

The combined result of both Ss. 103A and 103B is that the burden is on the

proprietor clearly to establish that the lands are his private lands, and this can be done by production of any other evidence such as mortgages and leases.
(VENKATARAMA IYER J.)

Harihar Prasad Singh v. *Deonarain Prasad*, (*ibid.*)

S. 116—Meaning of *Khudkast*, *Kamat*, *Sir*.

The word *Khudkast* means personal cultivation, which might include both private lands and raiyati lands, which had come into the possession of the proprietor by surrender, abandonment or otherwise. But the word *Kamat* has a definite connotation, and means private lands. The word *Sir* is synonymous with *Kamat* and *Ziraat* and means private lands of the proprietor.
(VENKATARAMA IYER J.)

Harihar Prasad Singh v. *Deonarain Prasad*, (*ibid.*)

BOMBAY MERGED TERRITORIES AND AREAS (JAGIRS ABOLITION) ACT, 1954—**Validity.**

The Act is not *ultra vires* the State Legislature. In any view the Act is protected by Art. 31-A of the Constitution. (BHAGWATI J.)

Umeg Singh v. *State of Bombay*, 1955 (2) SCR 164 : 1955 SC 540 : 1955 SCJ 472 : 1955 SCA 749 : 57 Bom LR 709.

BOMBAY TALUQDARI TENURE ABOLITION ACT, 1949, **Ss. 2 (3) and 5—*Lal liti* lands.**

The expression "taluqdari estate" is used in a descriptive sense indicating a particular tenure rather than a particular interest enjoyed by the Taluqdar. Having regard to the history of *Lal-liti* lands and the provisions of the Gujarat Taluqdar's Act, 1888, it is clear that *Lal-liti* lands are lands which form part of a taluqdari estate, even though no *jama* was actually paid for such lands to the taluqdar or to Government, and as such the Act applies to such lands.
(S. K. DAS J.)

Bhimjibhai v. *State of Bombay*, 1960 SC 438.

S. 5(1) clauses (a) and (b)—scope.

Clauses (a) and (b) of S. 5 (1) must be read together. While clause (a) makes all taluqdari lands liable to the payment of land revenue in accordance with the provisions of the Bombay Land Revenue Code, 1879, clause (b) merely clarifies the position as respects two categories of persons, *viz*., the taluqdar and his cadet, under the Act. It does not mean that if a third category of persons properly come under cl. (a) they will not be liable to payment of land revenue on a specious and unwarranted assumption that cl. (b) as the operating part cuts down the amplitude of cl. (a). The true view is that cl. (a) is a general provision and applies the Bombay Land Revenue Code to all taluqdari lands while cl. (b) is a particular deeming provision with regard to the taluqdar and his cadet. In this view *Lal-liti* lands will be liable under S. 5(1) to be assessed to land revenue. (S. K. DAS J.)

Bhimjibhai v. *State of Bombay*, 1960 SC 438.

BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, **S. 6 (2)—Validity—excessive delegation.**

The power delegated to the provincial Government by S. 6(2) of the Act does not suffer from the infirmity of excessive delegation. A notification issued by

virtue o f the said power cannot be challenged on the ground that it violates Art 31 of the Constitution.

The power to issue a notification can be exercised from time to time as occasion requires.

1954 Bom. 397 Affirmed. (GAJENDRAGADKAR J.)

Vasanlal Maganbhai v. *State of Bombay*, 1961 SC 4.

S. 34 (2-A)—Applicability.

The restriction placed by sub-section (2-A) to section 34 which was newly added by the Amending Act XXXIII of 1952 is on the right to terminate the tenancy and would come into play on the day on which the landlord's right to terminate the tenancy is perfected, namely, the day on which the tenancy actually terminates in consequence of the notice given to terminate it. Hence the sub-section would apply to all cases where notices might have been given but where the tenancy had not actually terminated before the coming into force of the amending Act.

60 Cal. 1037 Distinguished ; 1956 Bom. 285 Approved. (WANCHOO J.)

Jivabhai Purshotam v. *Chhagan Karson*, 1961 SC 1491.

BOMBAY TENANCY AND AGRICULTURAL LANDS (AMENDMENT) ACT, 1956—**Validity.**

The Act is covered by entry 18 in list II of the Seventh Schedule to the Constitution and is a legislation with reference to "land". It being within the legislative competence of the State Legislature no question as to its being colourable exercise of legislative power can arise.

The Act is protected by Article 31-A of the Constitution from attack on the score of violation of the fundamental rights enshirned in Articles 14, 19 and 31. (BHAGWATI J.)

Sri Ram Narain v. *State of Bombay*, 1959 SC 459.

S. 7.

Sec. 7 cannot be impugned on the ground of excessive delegation of legislative power. (BHAGWATI J.)

Sri Ram Narain v. *State of Bombay* (*ibid.*)

BOMBAY TENANCY AND AGRICULTURAL LANDS ACT (99 of 1958) —**Validity.**

Article 31-A (2) of the Constitution refers not only to estate but also to its local equivalent. In the case of persons who hold lands in Berar under the State and who pay land revenue to the State for the lands thus held by them, reading the definitions contained in S. 2 of the Madhya Pradesh Land Revenue Code, 1954 it follows that the land in the possession of a *Bhumiswami* who is a tenure holder is an "estate". Hence the Act seeking to extend to Vidharbha and Kutch the provisions of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956 is protected by Art 31-A (2) of the Constitution in so far as it affects lands held by persons in Berar as occupants. (GAJENDRAGADKAR J.)

Mahadeo Paikaji Kolbe v. *State of Bombay*, 1961 SC 1517.

CALCUTTA THIKA TENANCY ACT, 1949 **(as amended by Act 6 of 1953), S. 5 (1)—decree passed before the Act—Jurisdiction of Controller.**

The argument that even when a landlord has obtained a decree for ejectment against his *thika* tenant before the commencement of the (main) Act he must apply under Sec. 5 (1) and his claim for execution will have to be entertained and considered by the Controller under S. 5 (1) cannot be accepted. The deletion of the words "subject to the provisions of S. 28" from S. 5 (1) does not enlarge the jurisdiction of the Controller to reopen such disputes when decrees have already been passed by competent courts. The civil court therefore will have jurisdiction to entertain an application for the execution of the decree in such a case.

60 CWN 397 Affirmed. (GAJENDRAGADKAR J.)

Kanailal v. *Paramnidhi Sadhukhan*, 1958 SCR 360 : 1957 SC 907 : 1957 SCA 1033 : 1957 SCJ 99.

S. 28—Repeal by amending Act—retrospective.

The repeal of S. 28 of the main Act brought about by the Amending Act, 1953 is retrospective and hence the main Act as amended applies to pending proceedings for relief under the main Act by tenants against whom decrees for possession had not been executed on the date of the commencement of the main Act. Though the application was for relief under S. 28 no such relief can be granted, the section having ceased to exist retrospectively.

1954 Cal. 119 Overruled ; 59 CWN 384 Affirmed. (DAS GUPTA J.)

Mahadeolal Kanodia v. *Administrator General, West Bengal*, 1960 (3) SCR 578 : 1960 SC 936 : 1961 (1) SCJ 15.

HIMACHAL PRADESH ABOLITION OF BIG LANDED ESTATES AND LAND REFORMS ACT, 1954—**validity.**

In view of the provisions of Art. 31A of the Constitution, the validity of S. 11 of the Act or the provisions for acquisition of lands for compensation in accordance with the provisions of Schedule II of the Act cannot be challenged as unconstitutional. (SHAH J.)

Jadab Singh v. *Himachal Pradesh Administration*, 1960 SC 1008 : 1961 (1) SCJ 185.

MADHYA PRADESH ABOLITION OF PROPRIETARY RIGHTS (ESTATES, MAHALS, ALIENATED LANDS) ACT, 1950—**validity.**

The Act is valid in its entirety. (*per curiam.*).

State of Bihar v. *Sir Kameshwar Singh*, 1952 SC 252 : 1952 SCR 1020 : 1953 SCA 901 : 1952 SCJ 427 : 31 Pat 565.

MADRAS ESTATES (ABOLITION AND CONVERSION INTO RYOTWARI) ACT, 1948—**validity.**

The Act fulfills all the requirements of Art 31 (6) of the Constitution and therefore cannot be challenged as contravening Art 31 (2) of the Constitution. (MUKHERJEA J.)

Zamindar of Ettayapuram v. *State of Madras*, 1954 SC 257 : 1954 SCR 761 ; 1954 SCJ 282 : 1954 SCA 317 : 1954 (1) MLJ 486.

Interpretation.

The Court must interpret the Act as it finds it giving the ordinary and natural meaning to the words used by the Legislature and uninfluenced by any preconceived notion as to the validity of the Act. (S. R. DAS C. J.)

Rajah of Venkatagiri v. *State of Andhra Pradesh*, 1960 SC 32 : 1960 (1) SCR 552 : 1960 SCJ 62 : 1960 (1) MLJ 28 : 1960 Andh LT 265.

S. 3 (b)—Minor darmila Inams.

It was the settled law in Madras at the time when Act 26 of 1948 was passed that minor inamdars were owners of parts of an estate. When a notified estate vests in its entirety in the State under that provision, a minor darmila inam which forms part of it must also vest in it.

The grantee of the inam is in the position of an owner of the part of the estate granted to him, and that would be relevant when the controversy is as to his true status, whether the dispute is between the landlord and tenant or between the inamdar and the State. If the inamdar is owner in relation to his tenants, it would be illogical to hold that he is not that, in relation to the State. The result is that when the darmila inam does not relate to the entire village but only to a fraction of it, it must be held to retain its character as part of the estate in the hands of the inamdars and when the estate is notified under S. 1 (4) of the Act, the inam will vest in the State under S. 3 (b). (VENKATARAMA IYER J.)

State of Madras v. *Srinivasa Ayyangar*, 1955 (2) SCR 907 : 1956 SC 94 : 1956 SCJ 89 : 1956 SCA 665 : 69 LW 853 : 1956 (1) MLJ 63 : 1956 Andh LT 14.

S. 20—Applicability to minor darmila Inams.

S. 20 protects rights in land by way of lease or otherwise created by the land-holder before the notified date. The rights mentioned in S. 20 can only refer to the rights dealt with in S. 3 (c) and not to ownership which is within S. 3 (b). S. 20 has no application to transactions by which a person becomes a land-holder by reason of ownership of even a part of the estate being transferred to him and that being the character of a darmila minor inam, it is not protected by S. 20.

Minor inams fall outside S. 20 and would vest straightaway in the State under S. 3 (b) and this will have the effect of extinguishing the rights of the inamdars, and enabling the State to issue ryotwari pattas to the tenants in occupation.

1953 Mad. 190 Reversed. (VENKATARAMA IYER J.)

State of Madras v. *Srinivasa Ayyangar*, (*ibid.*)

S. 20 (1) Provisos 2 & 3—effect.

The second proviso makes rights created after 1st July 1945 unenforceable against the Government and was enacted to nullify the creation of rights in anticipation of the impending legislation and hence it was made unconditional. In one view of the matter it may well be taken as meaning that the creation of rights after 1-7-1945 is, by force of the second proviso itself, void as against the Government without any further necessity for any overt act to be done by the Government to avoid the same. But assuming that the effect of the second proviso to make such rights only voidable and not void, all that follows is that the Government must do something to avoid them. There is no warrant for saying that the avoidance must be under the terms of the third proviso and that will be to read the third proviso as a proviso not to the section but to the second proviso and there is no warrant in law for such a construction. Indeed, the third proviso deals with termination of rights created before July 1, 1945. (S. R. DAS C. J.)

Rajah of Venkatagiri v. *State of Andhra Pradesh*, 1960 SC 32 : 1960 (1) SCR 552 : 1960 SCJ 62 : 1960 (1) MLJ 28 : 1960 Andh LT 265.

S. 44—right of Darmila minor inamdar.

There cannot be any doubt that the darmila minor inamdar is a person who is entitled to claim compensation for the transfer of his portion of the estate to the Government.

S. 45 applies only to the distribution of the compensation determined under S. 44 as payable to the principal holder, when he is the holder of an impartible estate. It leaves untouched the rights of minor darmila inamdars to claim compensation under S. 44. (VENKATARAMA IYER J.)

State of Madras v. *Srinivasa Ayyangar*, 1955 (2) SCR 907 : 1956 SC 94 : 1956 SCJ 89 : 1956 SCA 665 : 69 LW 853 : 1956 (1) MLJ 63 : 1956 Andh LT 14.

MADRAS ESTATES LAND ACT, 1908, **S. 3 (2) (d)—estate—burden of proof.**

The burden of proving that certain lands constitute an "estate" is upon the party setting up the contention.

Where all that was proved was that in a village two blocks of land were separately granted to two different persons and it was difficult to say whether the grants were contemporaneous or otherwise and they were recognised under 2 separate title deeds ; *held*, it was not possible to conclude from this meagre material that one of the grants, even though it was a major portion of the area of the village concerned, was an "estate" within the meaning of section 3 (2) (d) and the Explanation.

District Board, Tanjore v. *Noor Mohammed Rowther*, 1953 SC 446 : 1952 (2) MLJ 86 : 65 LW 98.

MARWAR TENANCY ACT, 1949, **S. 85—whether repealed by Rajasthan Revenue Courts Act, 1951.**

There is no provision in the Rajasthan Revenue Courts (Procedure and Jurisdiction) Act, 1951 dealing with the substantive right created by S. 85 of the Tenancy Act. The Revenue Courts Act really contemplates the continuance in force of S. 85 of the Tenancy Act and there is therefore no foundation for the argument that the section has been repealed by S. 2 of the Revenue Courts Act. (IMAM J.)

Kesari Singh v. *State of Rajasthan*, 1961 SC 432 : 1961 (1) SCJ 254.

Procedure—effect of Rajasthan Revenue Courts Act, 1951.

Sections 7 and 9 and item 2 in group C of the First Schedule of the Rajasthan Revenue Courts (Procedure and Jurisdiction) Act, 1951 deal with matters dealt with in Ss. 118, 124 and 129 and item 4 of Group E in the Second Schedule of the Tenancy Act. Hence these latter provisions will have to be taken as repealed. The position then is that since the coming into force of the Revenue Courts Act, there is no period of limitation prescribed for making an application under S. 85 of the Tenancy Act and that application has to be made to a Collector. But the procedure contemplated by section 85, that the application made under it shall be heard and determined in the absence of the tenant, is an integral part of right granted by it and one cannot be separated from the other.

1954 Raj LW 459 Reversed. (IMAM J.)

Kesari Singh v. *State of Rajasthan*, (*ibid*).

Effect of rescission of notification.

The wording of the section does not indicate that the Deputy Commissioner's power to act when an application under that section is made, exists only so long as the notification remains in force. Hence steps can be taken under S. 85 by the appropriate Revenue Officer for realisation of rent found due, as arrears of land revenue, even after the notification under the section has been rescinded.

1954 Raj LW 459 Reversed. (IMAM J.)

Kesari Singh v. *State of Rajasthan*, (*ibid.*).

ORISSA ESTATES ABOLITION ACT, 1952—**whether colourable legislation.**

The Madras Estates Land (Orissa Amendment) Act, 1947 is no part of the Orissa Estates Abolition Act and hence there is no colourable exercise of legislative power in regard to the enactment of these provisions. (MUKHERJEA J.)

Gajpati Narayan Deo v. *State of Orissa*, 1954 SCR 1 : 1953 SC 375 : 1954 SCA 1 : 1953 SCJ 592 : (1954) Orissa 351 : 20 CLT 1.

S. 2 (g)—"estate."

In order to be an estate, the land must be held by an intermediary and must be included under one entry in any of the general registers of revenue-paying or revenue-free lands and such general registers must be prepared and maintained under the law for the time being in force, *i.e.*, Bengal Land Registration Act, 1876.

The definition covers lands which are factually included in the particular register referred to. (S. R. DAS C. J.)

Sailendra Narayan Deo v. *State of Orissa*, 1956 SCR 72 : 1956 SC 346 : 1956 SCA 870 : 1956 SCJ 449 : 22 Cut LT 251.

S. 2 (h)—other instrument.

The words "deed" and "other instrument" in S. 2 (h) must not be read *ejusdem generis* with "sanad," but must be read disjunctively and be interpreted according to their ordinary meaning. (BOSE J.)

Biswambar Singh v. *State of Orissa*, 1954 SC 139 : 1954 SCR 842 : 1954 SCJ 219 : (1954) Cuttack 398.

S. 3—whether discriminatory.

It cannot be contended that S. 3 which gives an unfettered discretion to the State Government to issue or not to issue a notification with respect to an estate is discriminatory, for the discretion must be exercised in the light of the policy of the Act and therefore it cannot be said to be an absolute or unfettered discretion, as sooner or later "all" estates must perforce be abolished.

However if any notification or order is made not in furtherance of the policy of the Act but in bad faith and by way of discrimination, such notification or order will be void. (S. R. DAS J.)

Biswambar Singh v. *State of Orissa*, (*ibid.*)

S. 5—buildings on the estate.

There is nothing in law which prevents the State from providing as part of an Estates Abolition scheme that buildings lying within an estate and used primarily for administration of the Estate, would vest in the Government as appurtenances to

the estate itself. Such acquisition comes within Art. 31 (2) of the Constitution and if the conditions laid down in Cl. (4) of that Article are complied with, it would be protected. (MUKHERJEA J.)

Gajpati Narayan Deo v. *State of Orissa*, 1954 SCR 1 : 1953 SC 375 : 1954 SCA 1 : 1953 SCJ 592 : (1954) Orissa 351 : 20 CLT 1.

Private lands of proprietor.

The contention that compensation for private lands of the proprietor in the possession of temporary tenants has been given only for the landlord's interests in these properties and nothing has been given in lieu of the tenant's interests cannot be accepted, for the entire interest of the proprietor in these lands has been acquired and the compensation payable for the whole interest has been assessed. (MUKHERJEA J.)

Gajpati Narayan Deo v. *State of Orissa*, (*ibid.*)

S. 37—validity.

S. 37 cannot be challenged as a piece of colourable legislation for it comes within the clear language of Entry 42 List III Sch. VII of the Constitution and is not a legislation on something which is non-existent or unrelated to facts. (MUKHERJEA J.)

Gajpati Narayan Deo v. *State of Orissa* (*ibid.*)

ORISSA TENANT'S PROTECTION ACT, 1948, **S. 2 (c) and (g) and** ORISSA MERGED STATES (LAWS) ACT, 1950, **S. 7 (a) and (h).**

The 1950 Act is an Act to extend *inter alia*, the 1948 Act to certain areas administered as part of the Province of Orissa. The two Acts have to be read together. If thus read there is no inconsistency between the provisions of the two Acts and hence a dispute between the Ruler of an erstwhile State which merged with the province of Orissa and the tenants in occupation of his private lands will be within the jurisdiction of the Revenue Court.

1954 Orissa 101 Reversed. (BHAGWATI J.)

Jagannath Behera v. *Harihar Singh*, 1958 SCR 1067 : 1958 SC 239 : 1958 SCJ 586 : 24 Cut LT 357.

PUNJAB SECURITY OF LAND TENURE ACT, 1953 **(as amended in 1955)—validity.**

The Act as amended by Act XI of 1955 is not beyond the legislative competence of the State Legislature.

The provisions of the Act substantially modify the land-owner's right to hold and dispose of his property in any estate or a portion thereof. It is therefore clear that the provisions of Article 31A of the Constitution save the Act from any attack based on the provisions of Arts. 14, 19 and 31 of the Constitution.

1954 Punj. 167 (FB) Approved. (SINHA J.)

Atma Ram v. *State of Punjab*, 1959 SC 519.

RAJASTHAN JAGIRDARS (ABOLITION OF POWERS) ORDINANCE XXVII OF 1948, **S. 8A (as amended)—validity.**

S. 8A of the Ordinance as inserted by Ordinance No. 10 of 1949 and amended by Ordinance No. 15 of 1949 is a clear contravention of Article 14 of the Constitution and is therefore void.

1953 Rajasthan 22 Affirmed. (GHULAM HASAN J.)

State of Rajasthan v. *Rao Manohar Singhji*, 1954 SC 297 : 1954 SCR 996 ; 1954 SCJ 439 : 1954 SCA 491 : 1954 Raj LW 220.

RAJASTHAN LAND REFORMS AND RESUMPTION OF JAGIRS ACT, 1952—**validity.**

The Act is not bad for non-compliance with Article 212-A (2) of the Constitution ; nor does it in any manner contravene Article 14 of the Constitution.
(VENKATARAMA IYER J.)

Amar Singhji v. *State of Rajasthan*, 1955 (2) SCR 164 : 1955 SC 504 : 1955 SCJ 523.

S. 4—"tribute"—liability to pay *Hukumnama* u/s. 190 of the Marwar Land Revenue Act, 1949.

The liability to pay *Hukumnama* (a levy chargeable under the law governing Jagir grants and the tenure on which they are held in Marwar, for recognition of the succession of a person to a Scheduled Jagir of his deceased ancestor) or other fees under S. 190 of the Marwar Land Revenue Act is not a "tribute" within the meaning of S. 4 of the Rajasthan Act of 1952 from the payment of which the Jagirdars are relieved.

Ratio in (1955) 5 Rajasthan 534 Approved but on a different line of reasoning. (RAJAGOPALA IYENGAR J.)

Thakur Bahadur Singh v. *State of Rajasthan*, 1961 SC 1338.

RAJASTHAN (PROTECTION OF TENANTS) ORDINANCE, 1949,—**validity.**

A law which requires that an owner who is not himself the tiller of the soil should assure to the actual tiller some fixity of tenure cannot on that ground alone be said to be unreasonable.

Hence taking into account the fact that the Ordinance is an emergency legislation of a temporary character, the Ordinance cannot be held to be void as contravening Art. 19 (1) (f) of the Constitution.

256 U. S. 135 Relied on. (VENKATARAMA IYER J.)

Indersingh v. *State of Rajasthan*, 1957 SCR 605 : 1957 SC 510 : 1957 SCA 735 : 1957 SCJ 376.

S. 3 (1)—validity.

On principle it is difficult to see why if it is competent to the legislature to leave it to an outside authority to decide when an enactment might be brought into force, it should not be competent to it to authorise that authority to extend the life of an Act beyond the period fixed therein.

Hence S. 3 (1) of the Ordinance conferring a power of extension of the Ordinance on the Rajpramukh is only a conditional legislation and is not *ultra vires* as constituting delegation of legislative power.

1951 SCR 747 Referred to ; 1949 FCR 595 Not Approved.
(VENKATARAMA IYER J.)

Indersingh v. *State of Rajasthan*, (*ibid.*)

S. 15—validity.

Assuming S. 15 of the Ordinance is bad, that does not affect the validity of the rest of the Act, as the matter dealt with in that section is clearly severable.
(VENKATARAMA IYER J.)

Indersingh v. *State of Rajasthan*, (*ibid.*)

U.P. CONSOLIDATION OF HOLDINGS ACT, 1954—**validity.**

The attack on Chapters II and III of the Act under Article 14 of the Constitution must fail.
(WANCHOO J.)

Attar Singh v. *State of U.P.*, 1959 SC 564 : 1959 SCJ 474 : 1959 ALJ 601.

U.P. TENANCY ACT, 1939, **Ss. 10, 16 and 20—applicability.**

The sections presuppose that the person claiming rights thereunder is a tenant.
(SUBBA RAO J.)

Bhinka v. *Charan Singh*, 1959 SC 960 : 1959 Sup 2 SCR 798 : 1960 SCJ 892 : 1959 ALJ 557 : 1959 All WR 440.

S. 29 (a)—tenant inducted by mortgagee.

It is a condition precedent to the application of this section that the person claiming benefit under it must have been admitted as tenant by a person who had the right to do so. Where, however, the person who purports to grant the lease has no authority to do so, whatever the rights *inter se* between the lessor and the lessee, as against the true owner the lessee does not, in law, acquire the status of a tenant and S. 29 (a) has no application to him.

A mortgagee in possession will have a right to admit a tenant either if he is so authorised by the mortgage deed or if the transaction is one which is protected by section 76 (a) of the Transfer of Property Act as an act of prudent management. Otherwise such a transaction, though valid as between the mortgagee and the lessee, cannot form the foundation on which any right under S. 29 (a) can be based.

1952 SCR 775 Referred to ; 1955 ALJ 834 Distinguished.
(VENKATARAMA IYER J.)

Asa Ram v. *Ramkali*, 1958 SCR 986 : 1958 SC 183 : 1958 SCJ 575 : 1958 (2) MLJ 32 : 1958 All WR 598 : 1958 (2) An WR 32.

S. 180—possession in accordance with law.

The words "possession.....in accordance with the law for the time being in force" mean possession with title.
(SUBBA RAO J.)

Bhinka v. *Charan Singh*, 1959 SC 960 : 1959 Sup 2 SCR 798 : 1960 SCJ 892.

U.P. ZAMINDARI ABOLITION AND LAND REFORMS ACT, 1950—**validity.**

The Act is valid in its entirety.
(*per Curiam.*)

State of Bihar v. *Sir Kameshwar Singh*, 1952 SC 252 : 1952 SCR 1056 ; 1952 SCJ 446 : 65 LW 527 : 31 Patna 565 : 1953 SCA 932.

U.P. ZAMINDARI ABOLITION AND LAND REFORMS ACT, 1951, **S. 6 (h)—*Bhumidari* rights created by S. 18—whether substituted security.**

Where property has vested in the State by virtue of a notification under S. 4 and its consequences under S. 6 the only course open to a person to whom the property had been mortgaged is to follow the compensation money as provided in S. 6 (h). *Bhumidari* rights created by S. 18 are special rights conferred on the intermediary by virtue of his cultivatory possession of the lands comprised therein and are not compensation. Hence a mortgagee cannot enforce his rights under the mortgage by sale of the *Bhumidari* rights created in favour of the mortgagor under S. 18 so far as his *sir* and *Khudkasht* lands and grove lands are concerned, as substituted security.

1959 All 179 Reversed. (WANCHOO J.)

Rana Sheo Ambar Singh v. *Allahabad Bank Ltd.*, 1961 SC 1790.

S. 20 (b)—Occupant—meaning.

The word "occupant" in S. 20 (b) means a person in occupation. But that person must be in occupation in his own right and not on behalf of some one else.

Where the person was recorded as *thekedar*, it is open to the Court to look beyond the entry and see if the occupation was on behalf of the landlord or on his own behalf. (WANCHOO J.)

Upper Ganges Sugar Mills Ltd. v. *Khalil*, 1961 SC 143.

VINDHYA PRADESH ABOLITION OF JAGIRS AND LAND REFORMS ACT, 1952—**Constitutional validity.**

The Constitutionality of the Act as a whole cannot be challenged in view of Art. 31-A of the Constitution. (WANCHOO J.)

State of Vindhya Pradesh v. *Moradhwaj Singh*, 1960 SC 796 : 1960 (3) SCR 106 : 1960 SCJ 754 : 1960 Nag LJ 678 : 1960 MPC 447.

S. 2 (1) (c).

Considering the setting in which the word *Ijaredar* has been used in the section, it should be confined to a person holding an *Ijara* which is a lease or form of land revenue or other proprietary right as distinguished from other kinds of land.

1955 (2) SCR 303 Referred to. (WANCHOO J.)

Padmini Kunwar v. *State of Vindhya Pradesyh*, 1961 SC 1204.

Ss. 22 (1), 37 and Cl. 4 (e) of the Schedule—validity.

The provisions of S. 22 as a whole provide a scheme for carrying out the intention of the Legislature expressed in S. 7 (a) and are perfectly Constitutional.

S. 37 barring the jurisdiction of civil Courts in certain matters dealt with in the Act is not *ultra vires* the powers of the State Legislature, for even S. 9 of the Code of Civil Procedure expressly recognises that if such a provision is made by any law, the jurisdiction of the Civil Courts will disappear.

Clause 4 (c) of the Schedule to the Act is not unconstitutional.

1954 Vindhya Pradesh 24 Reversed. (WANCHOO J.)

State of Vindhya Pradesh v. *Moradhwaj Singh*, 1960 SC 796 : 1960 (3) SCR 106 : 1960 SCJ 754 : 1960 Nag LJ 678 : 1960 MPC 447.

TORT

Actions in trover and detinue—distinction.

If a carrier or other bailee wrongfully and mistakenly delivers the chattel to the wrong person or refuses to deliver it to the right person, he can be sued as for a conversion and judgment for the plaintiff in trover is for recovery of damages for the conversion.

The action of detinue, on the other hand, is based upon a wrongful detention by the defendant of the plaintiff's chattel evidenced by a refusal to deliver it upon demand and judgment is for delivery of the chattel or payment of its value and damages for the detention.

Whether the plaintiff files an action in trover or in detinue is essentially a matter for his election. He can sue the bailee who has parted with wrongful possession of the goods in favour of a third person, either for wrongful conversion or wrongful detention or when the goods have been sold, he may waive the tort and sue as upon an implied contract for money had or received. The defendant cannot be heard to say, taking advantage of his own wrong, that the plaintiff must sue only in conversion. (BHAGWATI J.)

Dhian Singh v. *Union of India*, 1958 SCR 781 : 1958 SC 274 : 1958 SCA 307 : 1958 SCJ 363 : 1958 (1) An WR 93 : 1958 (1) MLJ 93.

Trover—essentials.

In every case before a plaintiff can maintain an action in trover he must establish that he had title to the goods in question and further he was entitled to the possession thereof when he called upon the defendant to deliver the goods. If the parties stood in the position of seller and purchaser then the plaintiff should show that the property in the goods which was initially with the defendant passed to him under the Sale of Goods Act. The position would be different if the defendant imported the goods as agent of the plaintiff since the title in such a case would be with the plaintiff and the only question would be whether the defendant was entitled to retain possession as he would be if he had paid the price of the goods on behalf of the Principal (plaintiff) and had not been reimbursed in respect of that amount.

Where the relationship of the parties to an agreement with reference to the goods imported by the defendant from abroad is that neither party is agent of the other and that the defendant is the seller and the plaintiff is the purchaser, then the title to the goods will pass to the plaintiff only when the defendant appropriates the goods to the contract, *e.g.*, by endorsing the shipping documents in favour of the plaintiff and where that is not done a claim for damages on the ground of conversion will be misconceived. (VENKATARAMA IYER J.)

Leach & Co. v. *Jardine Skinner*, 1957 SCR 438 : 1957 SC 357 : 1957 SCJ 313 : 1957 SCA 318 : 1957 SCC 237 : 1957 BLJR 750 : 1957 All WR 779 : 1957 ALJ 794 : 59 Bom LR 395 : 1957 MPLJ 497 : 1957 Nag LJ 321.

Wrongful detention—damages.

It is well settled that the plaintiff in an a action for wrongful detention is entitled, besides redelivery of the chattel or payment of its value in the alternative, also to damages for such wrongful detention. (BHAGWATI J.)

Dhian Singh v. *Union of India*, 1958 SCR 781 : 1958 SC 274 : 1958 SCA 307 : 1958 SCJ 363 : 1958 (1) An WR 93 : 1958 (1) MLJ 93.

Detinue and conversion—damages—value of goods—material date.

The position in law in regard to the measure of damages in an action for wrongful conversion cannot be said to be well settled. However it is clear that in actions for wrongful detention of chattel the measure of damages can only be the value of the goods as at the date of the verdict or judgment, *i.e.*, at the date of the decree. For in such a case though the cause of action arises at the moment of the refusal to redeliver the goods to the plaintiff, the wrongful detention is a continuing wrong and continues up to the time of redelivery by the defendant either voluntarily or under compulsion of a decree of court and the plaintiff asserts his title to the goods all the time.

English law Ref. (BHAGWATI J.)

Dhian Singh v. *Union of India*, 1958 SCR 781 : 1958 SC 274 : 1958 SCA 307 : 1958 SCJ 363 : 1958 (1) An WR 93 : 1958 (1) MLJ 93.

TRADE MARKS ACT, 1940

S. 8—Application under—and passing off action.

The considerations relevant in a passing off action in which the onus is on the plaintiff to prove whether there is the likelihood of the defendant's goods being passed off as the goods of the plaintiff, are somewhat different than those in an application for registration of a trade mark. Hence a decision in a passing off action will not be *Res Judicata* in an application under S. 8. (MAHAJAN J.)

National Sewing Thread Co., Ltd. v. *James Chadwick & Bros.*, 1953 SC 357 : 1953 SCR 1028 : 8 DLR SC 472 : 56 Bom LR 21 : 1953 (2) MLJ 215 : 1953 SCJ 509 : 1953 SCA 610.

Registration—when to be refused.

Under this section an application made to the Registrar to register a trade mark which is likely to deceive or cause confusion has to be refused notwithstanding the fact that the mark might have no identity or close resemblance with any other trade mark. (MAHAJAN J.)

National Sewing Thread Co., Ltd. v. *James Chadwick & Bros.*, (*ibid.*)

Burden of proof.

The burden of proving that the trade mark which a person is seeking to register is not likely to deceive or to cause confusion is upon the applicant. (MAHAJAN J.)

National Sewing Thread Co., Ltd. v. *James Chedwick & Bros.*, (*ibid.*)

S. 8 (a)—Trade connection test—applicability.

The test of trade connection between different goods applies as well to cases where the competing marks closely resemble each other as to cases where they are identical. (SARKAR J.)

Corn Products Co. v. *Shangrila Food Products*, 1960 (1) SCR 968 : 1960 SCJ 509 : 1960 SC 142 : 1960 (1) SCA 536 : 1960 MLJ (Cr) 418 : 62 Bom LR 163.

Value of English decisions.

English cases proceeding on the English way of pronouncing English words by English men are not of much assistance in India in deciding questions of phonetic

similarity which must be approached from the point of view of a man of average intelligence and of imperfect recollection. (SARKAR J.)

Corn Products Co. v. *Shangrila Food Products*, (*ibid.*)

Series of marks—scope.

The existence of a series of marks containing a common element or elements assists an applicant only when those marks are in extensive use in the market. The burden is on the applicant to prove such user. The presence of such marks in the Registrar's book does not prove their user at all. It is possible that they may have been registered but not used. No inference can be drawn as to their user by their mere presence in the Register. (SARKAR J.)

Corn Products Co. v. *Shangrila Food Products*, (*ibid.*)

Reputation—whether of the mark or the trader.

What is necessary is that the reputation should attach to the trade mark and the public should associate the trade mark with certain goods. The reputation concerned is that of the mark and not that of the maker of the goods bearing that mark. A trade mark may acquire a reputation in connection with the goods, even though a buyer may not know who the manufacturer of the goods bearing the trade mark is. (SARKAR J.)

Corn Products Co. v. *Shangrila Food Products*, (*ibid.*)

S. 13—purpose.

The avowed purpose of the section is not to confer any direct benefit on the rival traders or the general public but to define the rights of the proprietor under the registration, so as to minimise, even if it cannot wholly eliminate, the possibility of extravagant and unauthorised claims being made on the score of registration of the trade mark. (S. R. DAS J.)

Registrar of Trade Marks v. *Asok Chandra Rakhit Ltd.*, 1955 (2) SCR 252 : 1955 SC 558 : 1955 SCA 1043 : 1955 SCJ 562 : 1955 (2) MLJ 76 : 1955 MWN 935.

Discretion of Registrar.

The power of the Tribunal to require a disclaimer is conditioned and made dependent upon the existence of one of two things which are set out in clauses (a) and (b) and which are called the jurisdictional facts.

The exercise of the power conferred on the tribunal (Registrar) by this section always remains a matter of discretion to be exercised, not capriciously or arbitrarily but according to sound principles laid down for the exercise of all judicial discretion.

1891 AC 173 Relied on. (S. R. DAS J.)

Registrar of Trade Marks v. *Asok Chandra Rakhit Ltd.*, (*ibid.*)

Discretion when to be used.

The existence of one of the two jurisdictional facts referred to in cls. (a) and (b) of S. 13 and the finding that the trade mark contains parts or matters to the exclusive use of which the proprietor is not entitled does not conclude the matter and it must further be established that some good reason exists for the imposition

of a disclaimer and the tribunal will only exercise the discretionary power for good cause shown.

1908-2 Ch. 86 Relied on. (S. R. DAS J.)

Registrar of Trade Marks v. *Asok Chandra Rakhit Ltd.*, (*ibid.*)

Exercise of discretion—interference by High Court.

The proper approach in such a case is for the High Court to consider whether the Registrar had really gone so wrong as to make it necessary to interfere with his discretion. If the authority has exercised its discretion in good faith and not in violation of any law such exercise of discretion should not be interferred with by the High Court merely on the ground that it could have been exercised differently.

1890-15 AC 252 and 1926-44 RPC 27 Referred to. (S. R. DAS J.)

Registrar of Trade Marks v. *Asok Chandra Rakhit Ltd.*, (*ibid.*)

Right to part of a mark.

Where a distinctive label is registered as a whole, such registration cannot possibly give any exclusive statutory right to the proprietor of the trade mark to the use of any particular word or name contained therein apart from the mark as a whole. There may be a disclaimer in respect of parts contained in a trade mark registered as whole although the registration of the trade mark as a whole does not confer any statutory right with respect to that part.

In view of the facts that the word 'Shree' was not separately registered as a trade-mark in the name of the company and it had numerous meanings, *held*, the order of disclaimer in respect of that word 'Shree' was correct. (S. R. DAS J.)

Registrar of Trade Marks v. *Asok Chandra Rakhit Ltd.*, (*ibid.*)

Proviso—effect of disclaimer.

The proviso to the section preserves intact any right which the proprietor may otherwise under any other law have in relation to the mark or any part thereof *e.g.*, (passing off action, prosecution under the Indian Penal Code). The disclaimer is only for the purposes of the Act. It does not affect the rights of the proprietor except such as arise out of registration. In short the disclaimed parts or matters are not within the protection of the Statute. (S. R. DAS J.)

Registrar of Trade Marks v. *Asok Chandra Rakhit Ltd.* (*ibid*).

Ss. 76 and 77—appeal from decision of single Judge.

The appeal to the High Court provided in S. 76 of the Act is merely an addition of a new subject matter of appeal to the appellate jurisdiction already exercised by the High Court. The provisions of S. 76 are merely enabling provisions and it is open to the High Court to make use of them or not. There is nothing to prevent the High Court from hearing appeals under S. 76 according to the rules under which all other appeals are heard. Hence an appeal (under the Letters Patent) will lie from the decision of a single judge hearing an appeal under S. 76.

(1946) 2 Cal. 359 Overruled. (MAHAJAN J.)

National Sewing Thread Co. Ltd. v. *James Chadwick & Bros.*, 1953 SC 357 : 1953 SCR 1028 : 1953 SCJ 509 : 1953 SCA 610 : 8 DLR SC 472 : 56 Bom LR 21 : 1953 (2) MLJ 215.

TRANSFER OF PROPERTY ACT, 1882.

Applicability to cases not governed by the Act.

The assistance of the Act as a guide on matters which have been excluded from its purview by express words should not be invoked unless the provisions of the Act embody principles of general application.

Observation of NAPIER J. in 42 Mad 564 Approved. (MAHAJAN J.)

Namdeo Lokman Lodhi v. *Narmadabai*, 1953 SC 228 : 1953 SCR 1009 : 1953 SCJ 306 : 1953 SCA 517 : 8 DLR SC 336 : 55 Bom LR 517 : 55 PLR 312 : 1953 (1) MLJ 715 : 1952 MWN 592.

S. 2—principles of Mahommedan Law.

A transfer of property, where the Act applies, has to be under the provisions of the Act only and the Mahommedan Law of transfer of property cannot override statute law. (KAPUR J.)

Radhakishan L. Toshniwal v. *Sridhar Ramachandra*, 1960 SC 1368 : 1960 Nag LJ 684.

S. 3—immovable property—'profit a prendre'.

A right to catch and carry away fish in specific sections of a lake over a specified period amounts to a license to enter on the land coupled with a grant to catch and carry away the fish, that is to say, it is a 'profit a prendre'. As a 'profit a prendre' is regarded as a benefit arising out of land, it follows that it is immovable property within the meaning of the Transfer of Property Act.

1953 SCR 476 Distinguished. (BOSE J.)

Anand Behara v. *State of Orissa*, 1955 (2) SCR 919 : 1956 SC 17 : 1956 SCJ 96 : 1956 SCC 70 : (1956) Cut 425 : 69 LW 872 : 1952 (1) MLJ 69 : 22 Cut LT 101.

S. 41—Transfer by ostensible owner.

Where a person who has allowed another to occupy the position of an ostensible owner has only a limited estate, the rule of S. 41 applies only during the lifetime of the limited owner and is not available to protect the transferee against the claim of the reversioners. (MAHAJAN J.)

Mt. Phool Kuer v. *Mt. Prem Kuer*, 1952 SCR 793 : 1952 SC 207 : 1952 SCJ 296 : 1952 SCA 557 : 1952 ALJ 737 : 65 LW 1235 : 1952 (1) MLJ 823 : BLR 1952 SC 241 : (1953) 2 All 195.

S. 51—Value of improvements—date of eviction is to be the criterion.

S. 51 merely lays down an equitable principle and enables a court to determine the equities between the parties. If the evidence enables a court to do so, it should assess the valuation of the improvement as at a date as near as possible to the date of actual eviction rather than the date of election by the plaintiff. (IMAM J.)

Narayan Rao v. *Basavarayappa*, 1956 SC 727 : 1957 KLT 20 : (1956) Mys 184.

S. 52 [*Lis pendens* :—During the pendency.....of any suit.....which is not collusive .....right to immoveable property is directly and specifically in question, the property cannot be transferred.....so as to affect the rights..... of any other party thereto under any decree.....

Explanation :—.....the pendency.....shall be deemed to commence from the date of the presentation of the plaint.....]

***Lis* when commences—suit for maintenance.**

It is rightly conceded that when a suit is filed for maintenance and there is a prayer that it be charged on specified properties, it is a suit in which right to immovable property is directly in question, and the lis commences on the date of the plaint and not on the date of the decree which creates the charge.

(VENKATARAMA IYER J.)

Nagubai v. *Shama Rao*, 1956 SCR 451 : 1956 SC 593 : 1956 SCA 959 : 1956 SCJ 655 : 1956 SCC 321 : (1956) Mys 152 : 1956 Andh LT 1029.

Collusion—question of fact.

Whether a proceeding is collusive or not is essentially a question of fact.

(VENKATARAMA IYER J.)

Nagubai v. *Shama Rao*, (*ibid.*).

Distinction between collusive and fraudulent proceedings.

The distinction between collusive proceedings and fradulent proceedings is fundamental. In a collusive proceeding, the claim put forward is fictitious, the contest over it is unreal and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties.

In a fraudulent proceeding, the claim made is untrue ; but the claimant manages to obtain the verdict of the court in his favour and against his opponent by practising fraud on the court. Such a proceeding is started with a view to injure the opponent, and there can be no question of its having been initiated as the result of an understanding between the parties. While in collusive proceedings the combat is a mere sham, in a fraudulent suit it is real and earnest.

(VENKATARAMA IYER J.)

Nagubai v. *Shama Rao*, (*ibid.*).

***Lis pendens*—application to pre-emption suits.**

The doctrine applies only to a transfer *pendente lite* and cannot affect a pre-existing right. If the sale is in recognition of a pre-existing and subsisting right, it will not be affected by the doctrine as it does not create a new right *pendente lite*, but if the pre-existing right became unenforceable by reason of limitation or otherwise, the transfer though ostensibly made in recognition of such a right, in fact creates only a new right *pendente lite*.

(1946) Lah 467 (FB) Approved ; 1927 All 664 Not Approved.

During the pendency of a suit for pre-emption, another pre-emptor of equal degree with the plaintiff, who had earlier obtained a decree for pre-emption deposited the sale price and had entered into possession of the land. It was contended on behalf of the plaintiff that the other pre-emptor having been substituted in the place of the original vendee *pendente lite*, he could not claim higher rights than the original vendee, the transaction being hit by *lis pendens* and that the plaintiff being a pre-emptor of equal degree was entitled to share with the other pre-emptor.

Held (negativing the contention), the substitution of the other pre-emptor, though during the pendency of the suit, being in recognition of a pre-existing right, was not hit by *lis pendens* and therefore the plaintiff who was only an equal pre-emptor could not claim any right as against the substituted pre-emptor.

1954 Pepsu 59 Reversed. (SUBBA RAO J.)

Bishan Singh v. *Khazan Singh*, 1958 SC 838.

Effect of transfer between parties thereto.

The contention that a transfer must when it falls within the mischief of the section, be deemed to be *non est*, cannot be accepted for it gives no effect to the words, 'so as to affect.....made therein' which make it clear that the transfer is good except to the extent that it might conflict with rights decreed. Hence transfers *pendente lite* are valid and operative as between the parties thereto.
(VENKATARAMA IYER J.)

Nagubai v. *Shama Rao*, 1956 SCR 451 : 1956 SC 593 : 1956 SCA 959 : 1956 SCJ 655 : 1956 SCC 321 : (1956) Mys 152 : 1956 An LT 1029.

S. 53A—Part performance.

The person claiming under the transferor referred to in the section is obviously a person who claims under a title derived subsequently to the date of the transfer and not anterior to the said date. Thus in a case where the plaintiff claims under a good and genuine contract of sale earlier in date to the contract of the defendant who took his contract with the knowledge of the plaintiff's earlier title, S. 53A has no application. (CHANDRASEKHARA IYER J.)

Hemraj v. *Rustomji*, 1953 SC 503.

Formal deed whether necessary.

A formal lease is not necessary to attract the application of S 53A. All that is required is that an agreement in writing signed by the transferor can be gathered in evidence.

A suit in ejectment against a lessee on the ground that there was no registered lease deed must fail if the defendant proves the existence of a written agreement of lease signed by the lessor in pursuance of which he has taken possession of the land, erected superstructures and also paid rent to the plaintiff as per the agreement.
(MAHAJAN J.)

Maneklal Mansukhbai v. *Ginwalla*, 1950 SCR 75 : 1950 SC 1 : 1950 SCJ 17 : 5 DLR (SC) 11 : 1950 RLW 117 : 1950 (2) MLJ 344 : 52 Bom LR 521 : 63 LW 495.

S. 54—Sale of *profit a prendre*.

A sale of a right to catch and carry away fish in a specified portion of a lake, (which is a 'profit a prendre' and therefore immoveable property) of the value more than Rs. 100/- (whether it is regarded as tangible immoveable property or intangible) requires writing and registration. An oral sale in such a case passes no title or interest. (BOSE J.)

Anand Behara v. *State of Orissa*, 1956 SC 17.

S. 55(2)—Form of warranty.

The vendee's insistence upon a particular form of warranty cannot affect

the agreement to sell, though it might in a given case disentitle him to specific performance which would depend upon whether his proposal regarding a form of warranty to which he is not entitled is mere proposal regarding the form of the sale deed or a refusal to perform without it. (BOSE J.)

Durga Prasad v. *Deep Chand*, 1954 SC 75 : 1954 SCR 360 : 1954 SCJ 23 : 1954 SCA 934 : 9 DLR SC 77 : 1954 ALJ 73 : 67 LW 945 : 1954 (1) MLJ 60 : 1954 MWN 222 : 2 BLJ 213.

S. 58 (c)—presumption.

The question whether a transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase must be decided on the facts of the particular case. The legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgages ; therefore it is reasonable to suppose that persons who after the amendment choose not to use two documents do not intend the transaction to be a sale unless they displace that presumption by clear and express words.

Therefore once a transaction is embodied in one document and not two and once its terms are covered by section 58(c) then it must be taken to be a mortgage by conditional sale unless there are express words to indicate the contrary or in a case of ambiguity, the attendant circumstances necessarily lead to the opposite conclusion. (BOSE J.)

Chunchun Jha v. *Ebadat Ali*, 1954 SC 345 : 1955 (1) SCR 174 : 1954 SCJ 469 : 1954 SCA 611 : 1954 Andh LJ SC 45 : 1954 ALJ 546 : 1954 (1) MLJ 708 : 2 BLJR 421.

Mortgage by conditional sale and sale with agreement to repurchase—determination.

The question is one of determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of the surrounding circumstances. The circumstance that the transaction as phrased in the document is ostensibly a sale with a right of repurchase, the appearance being laboriously maintained that the interest conveyed was an absolute one or that the right of repurchase granted was one in which time was of the essence, is not decisive. Oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the document may, of course, be given. Evidence of contemporaneous conduct is admissible as a surrounding circumstance but not the subsequent conduct of parties. (SHAH J.)

Bhaskar Waman Joshi v. *Shrinarayan Rambilas Agarwal*, 1960 (2) SCR 117 : 1960 SC 301 : 1960 SCJ 327 : 1960 (2) SCA 189 : 1960 (1) MLJ 87 : 1960 (1) An WR 87 : 1960 (1) Ker LR 142 : 1960 MPC 409.

S. 58 (d)—Distinction between mortgage and lease.

Once there is a debt with security of land for its redemption, then the arrangement is a mortgage by whatever name it is called.

Ghosh on Mortgages V Edition Vol. I page 102 Ref. to. (SUBBA RAO J.)

Ramdhan Puri v. *Bankey Bihari Saran*, 1958 SC 941.

Ss. 58 (f) and 59—registration.

When the debtor deposits with the creditor the title deeds of his property with intent to create a security, the law implies a contract between the parties, to

create a mortgage and no registered instrument is required. But if the parties choose to reduce the contract to writing, this implication is excluded by their express bargain and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral part of the transaction. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under S. 17, Registration Act. The time factor is not decisive. The document may be handed over to the creditor along with the title deeds and yet may not be registrable ; or it may be delivered later and nevertheless be registrable.

A memorandum was in the following terms :—

"We write to put on record that to secure the repayment of money due to you by us.....and the money that may hereafter become due.....we have this day deposited with you the following title deeds.....with intent to create an equitable mortgage on the said properties....."

Held on facts, the parties did not intend thereby to create the charge and that the memorandum did not require registration.

1948 Patna 251 Affirmed. (PATANJALI SASTRI J.)

Rachpal v. *Bhagwandas*, 1950 SCR 548 : 1950 SCJ 361 : 1950 SC 272 : 63 LW 1025 : 1950 (2) MLJ 350 : 86 CLJ 126 : 5 DLR SC 79 : 1950 MWN 738.

S. 60—Right to redeem.

The legal position regarding redemption may be stated thus :—

1. The governing principle is "once a mortgage always a mortgage" unless the mortgage is terminated by the act of parties themselves or by merger or by order of the court.

2. Where a mortgagee purchases the equity of redemption in execution of his mortgage decree with the leave of the court or in execution of a mortgage or money decree obtained by a third party, the equity of redemption is extinguished and the mortgagor cannot sue for redemption without getting the sale set aside.

3. But where a mortgagee purchases the mortgaged property by reason of a default committed by him the mortgage is not extinguished and the relationship of mortgagor and mortgagee continues to subsist even thereafter, for his purchase of the equity of redemption is only in trust for the mortgagor.

(SUBBA RAO J.)

Mrutunjay Pani v. *Narmadabai*, 1961 SC 1353.

Clog—prohibition of redemption for a long time.

The court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the money on the mortgage. If he was oppressed or imposed upon he may be entitled to relief. The question whether there is anything unconscionable in the agreement is essentially one of fact and has to be decided on the circumstances of each case.

A mortgage deed provided that the mortgagor will not be entitled to redeem for a period of 85 years and that thereafter he should redeem within 6 months and not thereafter.

Held that the latter term amounted to a clog and was invalid and must be ignored but that it stood quite apart and that the invalidity of the one did not make the other (*viz.*, prohibiting redemption before the expiry of 85 years) also invalid. *Held also* that the length of the term, *viz.*, 85 years, itself did not lead to the conclusion that it was an oppressive term and that in the circumstances of the case, it was a reasonable one and could be enforced and that a suit brought for redemption before the expiry of that period was premature and must fail. (SARKAR J.)

Ganga Dhar v. *Shankar Lal*, 1958 SC 770 : 1958 SCA 739 : 1958 SCJ 935 : 1958 (2) MLJ 150 : 1958 (2) An WR 150 : 1959 Pat LR 8.

S. 66—waste by mortgagor in possession.

Section 66 is a statutory enactment of the powers of the mortgagor in possession in regard to waste of the mortgaged property. He is not liable for what in terms of the English Law of Real Property is known as permissive waste, *i.e.*, omission to repair or to prevent natural deterioration. He is however liable for destructive waste, *i.e.*, acts which are destructive or permanently injurious to the mortgaged property if the security was insufficient or would be rendered insufficient by such acts. The section therefore has no application to the grant of a lease by a mortgagor in possession. (BHAGWATI J.)

Kamakshaya Narayan Singh v. *Chohan Ram*, 1953 SCR 108 : 1952 SC 401 : 1952 SCJ 553 : 1952 SCA 807 : 66 LW 549 : 31 Pat 1020 : 1 BLJR 1 : 8 DLR SC 10 : 1952 ALJ 710 : 1953 (1) MLJ 12.

S. 76 [(a) When.....the mortgagee takes possession.....he must manage .....as a person of ordinary prudence.....if it were his own ;.....]

Scope of the section.

A lease created by a usufructuary mortgagee would normally terminate on the redemption of the mortgage. S. 76 (a) enacts an exception to this rule. If the lease is one which could have been made by the owner in the course of prudent management, it would be binding on the mortgagors, notwithstanding that the mortgage has been redeemed. Even in such a case, the operation of the lease cannot extend beyond the period for which it was granted.
(VENKATARAMA IYER J.)

Harihar Prasad v. *Deo Narain*, 1956 SCR 1 : 1956 SC 305 : 1956 SCJ 279 : 1956 SCA 316.

Lease by mortgagee—burden of proof.

An agricultural lease created by a mortgagee in possession will be binding on the mortgagor even though the mortgage has been redeemed, provided it is of such a character that a prudent owner of property will enter into it in the usual course of management. This being in the nature of an exception it is for the person who claims the benefit of the section to strictly establish it.

The point whether the rent fixed is reasonable and fair having regard to the income which a prudent owner could have got from the land is one of the factors to be taken into account.

A lease by the mortgagee which puts in peril the special rights of the mortgagor over the property which is home farm land under the direct cultivation of the proprietor, which rights tenancy laws all over India have recognised, cannot be regarded as an act of a prudent owner and requires exceptional grounds to justify it. (VENKATARAMA IYER J.)

Asa Ram v. *Ram Kali*, 1958 SCR 986 : 1958 SC 183 : 1958 SCJ 575 : 1958 (2) MLJ 32 : 1958 All WR 598 : 1958 (2) An WR 32.

S. 76 (a) & (e)—mortgage deed containing prohibition.

A mortgagee (with possession) may grant leases not extending beyond the period of the mortgage. Any lease granted by him must come to an end at redemption. A mortgagee cannot during the subsistence of the mortgage act in a manner detrimental to the mortgagor's interest such as by giving a lease which may enable

the tenant to acquire permanent or occupancy rights in the land thereby defeating the mortgagor's right to 'Khas' possession. That will not be an act falling within S. 76 Cl. (e).

However a permissible settlement by the mortgagee with a tenant in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period is a different matter altogether and is an exception to the general rule. The tenant in such a case cannot be evicted even after the redemption of the mortgage. But the settlement of a tenant by the mortgagee must be a bonafide one. This exception will not apply in a case where the terms of the mortgage, either expressly or by necessary implication, prohibit the mortgagee from making any settlement of tenants. (CHANDRASEKHARA IYER J.)

Mahabir Gope v. *Harbans Narain*, 1952 SC 205 : 1952 SCR 775 : 1952 SCJ 292 : BLR 1952 SC 239 : 90 CLJ 180 : 7 DLR SC 236 : 1952 SCA 436.

S. 77 and S. 76 (g)—liability to account.

Under the terms of a mortgage, the mortgagee was entitled to take the entire receipts from the land in lieu of interest. *Held*, there was a contract within the meaning of S. 77 and that therefore the mortgagee was not liable to account under S. 76. The mere mention of a rate of interest does not necessarily lead to the conclusion that the mortgagee would have to take only such part of the nett receipts sufficient to discharge the interest and credit the balance to the mortgagor. *Held also*, whether the transaction was a usufructuary mortgage or an anomalous mortgage will not make any difference in the matter of rendition of accounts. (SUBBA RAO J.)

Ramdhan Puri v. *Bankey Bihari Saran*, 1958 SC 941 : 1959 SCA 110 : 1959 SCJ 121 : 1959 (1) An WR 53 : 1959 (1) MLJ 53.

S. 82—Contribution—computation.

Where on the facts set out by the plaintiff it is evident he is entitled to contribution the method of computation is a matter of law and it is for the Court to apply the law to the facts and grant the appropriate relief. (BOSE J.)

Kedarlal v. *Harilal*, 1952 SC 47 : 1952 SCR 179 : 1952 SCJ 37 : 1952 (1) MLJ 431 : BLR 1952 SC 81 : 1952 MWN 104 : 65 LW 179 : 7 DLR SC 133.

S. 105—Lease—Kabuliyat.

Where the lessee executes a Kabuliyat and there is evidence that the lessor accepted the Kabuliyat and received rent as provided therein, an objection that the lessor had not executed any lease deed and that the lessee could not claim the status of a tenant solely on the strength of the Kabuliyat, as that was merely a unilateral undertaking by him to cultivate, must be overruled.
(VENKATARAMA IYER J.)

Asa Ram v. *Ram Kali*, 1958 SCR 986 : 1958 SC 183 : 1958 SCJ 575 : 1958 (2) MLJ 32 : 1958 All WR 598 : 1958 (2) An WR 32.

Ss. 105 to 116—Whether founded on principles of equity.

The statement in (1948) Mad. 757 (FB) that sections 105 to 116 are founded on principles of reason and equity is formulated in too wide a language and cannot be accepted either as correct or precise. (MAHAJAN J.)

Namdeo Lokman Lodhi v. *Narmadabai*, 1953 SC 228 : 1953 SCR 1009 :

1953 SCJ 306 : 1953 SCA 517 : 8 DLR SC 336 : 55 Bom LR 517 : 55 PLR 312 : 1952 MWN 592 : 1953 (1) MLJ 715.

S. 106—applicability to leases implied by law—payment of annual rent.

The rule of construction as to the duration of the lease embodied in S. 106 applies not only to express leases of uncertain duration but also to leases implied by law which may be inferred from possession and acceptance of rent and other circumstances. Similarly the contract to the contrary contemplated by S. 106 need not be express. It may be implied but it should be a valid contract. When the rent reserved is an annual rent the presumption would arise that the tenancy was an annual tenancy unless there is something to rebut the presumption.

Where the intended lease was for a period exceeding a year but as the intention was not expressed in the proper legal form, the Kabuliyat could not be given effect to ; *held*, although there was payment and acceptance of an annual rent, the normal presumption under the section would come into play and as the lease was not for an agricultural or manufacturing purpose the tenancy created by implication of law was one from month to month. (MUKHERJEA J.)

Ramkumar Das v. *Jagdish Chandra Deo*, 1952 SC 23 : 1952 SCR 269 : 1951 SCJ 813 : BLR 1952 SC 50 : 1952 MWN 120 : 31 Pat 21 : 65 LW 219 : 1952 SCA 79 : 7 DLR SC 141.

Notice to quit—when necessary.

It is well settled that where a contractual tenancy to which rent control legislation applies has expired by efflux of time or by determination by notice to quit and the tenant continues in possession of the premises, acceptance of rent from the tenant by the landlord after the expiration or determination of the contractual tenancy will not afford ground for holding that the landlord has assented to a new contractual tenancy.

1949 FCR 262 Referred to.

Hence where after the determination of the contractual tenancy but while the tenant remains in occupation by virtue of the statutory immunity and pays rent to the landlord, the landlord sues under the provisions of the rent control legislation for eviction of the tenant, *e.g.*, on the ground that the premises are reasonably required by the landlord for putting up new construction, it cannot be contended by the tenant that he is a tenant "holding over" and that the tenancy can be determined only by the requisite notice to quit.

Of course there is no prohibition against a landlord from entering into a fresh contract of tenancy with such a tenant. Also apart from an express contract, the conduct of the parties may undoubtedly justify an inference as to the new contract but that must always depend upon the facts of each case.

1956 Cal. 120 Affirmed. (SHAH J.)

Ganga Dutt Murarka v. *Kartik Chandra Das*, 1961 SC 1067 : 1961 Andh LT 364.

S. 108 (j)—Distinction between assignment and relinquishment or surrender.

In the case of an assignment the assignor continues to be liable to the landlord for the performance of his obligations under the tenancy and this liability is contractual while the assignee becomes liable by reason of privity of estate. The consent of the landlord to an assignment is not necessary in the absence of a contract or local usage to the contrary. But a relinquishment can only be in favour of the lessor by mutual agreement between them. The relinquishment of possession must be to the lessor or some person who holds his interest. A relinquishment

which is equivalent to surrender by the lessee of his rights as such, terminates the lessee's rights and lets in the lessor. (CHANDRASEKHARA IYER J.)

W. H. King v. *Union of India*, 1952 SC 156 : 1952 SCR 418 : 1952 SCJ 133 : BLR 1952 SC 190 : 1952 Cr LJ 836 : 54 Bom LR 435 : 7 DLR SC 171 : 1952 SCA 306.

Covenant not to assign without consent.

Where a lessee covenanted "not to assign the demised premises without first obtaining the written consent of the lessor, such consent however, not to be unreasonably withheld in the case of respectable or responsible person....." ;

Held, the words do not amount to an independent covenant by the lessor that he would not refuse consent unreasonably, but limit or qualify the lessee's covenant not to assign without consent and have the effect of relieving the lessee from the burden of this covenant if the lessor withholds consent unreasonably in case of proposed assignment to a respectable or responsible person. (S. R. DAS J.)

Kamalaranjan v. *Baijnath*, 1950 SCR 840 : 1951 SC 1 : 1951 SCJ 13 : 6 DLR SC 68 : 1951 MWN 361 : 64 LW 341 : BLR 1951 SC 6.

S. 108 (l)—liability to pay rent.

An *inter se* partition of the leasehold interest among the lessees cannot affect their liability *qua* the lessor for the payment of the whole rent, as several tenants of a tenancy in law constitute but a single tenant and *qua* the landlord they constitute one person each constituent part of which possesses certain common rights in the whole and is liable to discharge common obligations in their entirety. Such partitions amongst several lessees are usually made for convenience of enjoyment of the leasehold but they do not in any way affect the integrity of the tenancy or make each holder of an interest in it as a separate holder of a different tenancy.

Similarly a partition *inter se* amongst the several owners of a property subject to a lease cannot in any way affect the integrity of the lease in the absence of a fresh contract between the split-up owners of the holding and the different lessees. (MAHAJAN J.)

Badri Narayan Jha v. *Rameshwar Dayal Singh*, 1951 SC 186 : 64 LW 531 : 1951 SCR 153 : 1951 SCJ 252 : 30 Pat 664 : 1951 ALJ 120 : BLR 1951 SC 171 : 1951 SCA 429.

S. 108 (q) & S. 105—liability of tenant who inducts another after termination.

It is one of the obligations of a contract of tenancy that the tenant will, on the determination of the tenancy put the landlord in possession of the property demised. He does not absolve himself from the obligations of his tenancy by intimating that as from a particular date he will cease to be in occupation under the landlord and that some one else, whom the landlord is not willing to accept, will be the tenant.

A, a tenant, wrote a letter to the landlord that he was vacating the premises on a particular date and that another B would be in occupation and would be personally responsible for payment of rent. The landlord demanded vacant possession. A did not surrender his rights to the landlord nor did he serve the notice required by law. The landlord did not accept the unilateral termination of the tenancy. A allowed B to occupy the premises. The landlord applied under S. 13 of the East Punjab Urban Rent Restriction Act, 1949 for an order against both A & B.

Held, the true position was that on the service of the letter A did not cease to be a tenant, B who was put into possession became an assignee of the rights of

A as a tenant and therefore both A and B were liable to be sued in ejectment under the Act.

60 Pun LR 349 Reversed. (SHAH J.)

Kishanlal v. *Ganpat Ram Khosla*, 1961 SC 1554.

S. 111 (d)—Merger.

If the lessor purchases the lessee's interest the lease no doubt is extinguished, but there is no extinction if one of the several lessees purchases only a part of the lessor's interest. In such a case the leasehold and the reversion cannot be said to coincide. (MAHAJAN J.)

Badri Narayan Jha v. *Rameshwar Dayal Singh*, 1951 SC 186 : 64 LW 531 : 1951 SCR 153 : 1951 SCJ 252 : 30 Pat 664 : 1951 ALJ 20 : BLR 1951 SC 171 : 1951 SCA 429.

S. 111 (g)—Lease before the Act—notice.

The provision as to notice in writing as a preliminary to a suit in ejectment based on forfeiture of a lease is not based on any principle of justice, equity or good conscience and cannot govern leases made prior to the coming into force of the Transfer of property Act, 1882, or to leases executed prior to 1-4-30, the date of coming into force of the amending Act of 1929.

1947 Mad. 68 and (1951) Bom. 293 Overruled ; 1950 Bom. 123 Affirmed ; case law discussed. (MAHAJAN J.)

Namdeo Lokman Lodhi v. *Narmadabai*, 1953 SC 228 : 1953 SCR 1009 : 1953 SCJ 306 : 1953 SCA 517 : 8 DLR SC 336 : 55 Bom LR 517 : 55 PLR 312 : 1953 (1) MLJ 715 : 1952 MWN 592.

S. 114 [Where.....for non-payment of rent,.....the lessor sues to eject the lessee, if.....the lessee pays.....the Court may .....order relieving the lessee against forfeiture.]

Discretion—when not exercised.

It cannot be contended that though the section confers a discretion on the court that discretion, except in cases where third party interests intervene, must always be exercised in favour of the tenant irrespective of his conduct. In exercising the discretion each case must be judged by itself. The delay, the conduct of parties and the difficulties to which the landlord has been put, should be weighed against the tenant.

(1912) AC 623 Referred to ; 39 Mad. 834 Approved. (MAHAJAN J.)

Namdeo Lokman Lodhi v. *Narmadabai*, 1953 SC 228 : 1953 SCR 1009 : 1953 SCJ 306 : 1953 SCA 517 : 8 DLR SC 336 : 55 Bom LR 517 : 55 PLR 312 : 1952 MWN 592 : 1953 (1) MLJ 715.

S. 116 [If a lessee.....remains in possession.....after the determination of the lease.....and the lessor.....accepts rent.....or otherwise assents .....the lease is.....renewed.]

Acceptance of rent.

For the application of S. 116, two things are necessary : (1) the lessee should be in possession after the termination of the lease ; (2) the lessor or his representative should accept rent or otherwise assent to the lessee continuing in possession. There can be no question of the lessee continuing in possession until the lease has

expired and the context in which the provision for acceptance of rent finds a place clearly shows that what is contemplated is that the payment of rent and its acceptance should be made at such a time and in such a manner as to be equivalent to the landlord assenting to the lessee continuing in possession.

Where the payment was made at a time when there was no question of the lessor assenting to the lessee continuing in possession and neither party treated the payment as importing such assent, S. 116 will not apply. (FAZL ALI J.)

Karnani Industrial Bank v. *Province of Bengal*, 1951 SC 285 : 64 LW 977 : 1951 SCR 560 : BLR 1951 SC 254 : 1952 SCA 1 : 1951 SCJ 407 : 1951 ALJ 625 : 89 CLJ 62.

TRAVANCORE-COCHIN LAND TAX ACT, 1955 **(as amended in 1957), Ss. 4, 5A and 7—validity.**

Sections 4 and 7 offend Article 14 of the Constitution and sections 4, 5A and 7 offend Article 19 (1) (f) of the Constitution. (SINHA C. J.)

K. T. Moopil Nair v. *State of Kerala*, 1961 SC 552 : 1961 Ker LJ 143.

TRAVANCORE REGULATION VIII OF 1090 (1915), S. **35—Good faith.**

Honesty is the test to be applied in insolvency proceedings in judging the bonafides of the creditor. Hence the definition of good faith in the Travancore Cochin General Clauses Act, 1950, will not apply to the term in S. 35. Therefore a secured creditor who has advanced money to a debtor honestly, even though he may not have taken all due precautions, will not come within the mischief of S. 35. (SINHA J.)

Subramania Iyer v. *Official Receiver, Quilon*, 1958 SCR 257 : 1958 SC 1 : 1958 SCJ 172 : 1958 KLJ 17 : 1958 KLT 1195.

Res judicata.

The finding of the insolvency court in adjudication proceedings that a transfer was an act of insolvency with intent to defeat and delay the creditor is not *Res judicata* between the Receiver and the transferee in proceedings for annulment of the transfer. (SINHA J.)

Subramania Iyer v. *Official Receiver, Quilon*, (*ibid.*)

TRUST—**Charitable trusts—*Cy pres* doctrine.**

When the particular purpose for which a charitable trust is created fails or by reason of certain circumstances the trust cannot be carried into effect either in whole or in part or where there is a surplus left after exhausting the purposes specified by the settlor, the Court would not when there is a general charitable intention expressed by the settlor, allow the trust to fail but would execute it *cy pres*, that is to say, in some way as nearly as possible to that which the author of the trust intended. In such cases the Court can frame a scheme and give suitable directions regarding the objects upon which trust money can be spent. However where the donor's intention can be given effect to, the Court has no authority to sanction any deviation from the intentions expressed by the settlor on grounds of expediency and the Court cannot exercise the power of applying trust property or its income to other purposes simply because it considers them to be more expedient or more beneficial than what the settlor had directed. (MUKHERJEA J.)

Ratilal Panachand Gandhi v. *State of Bombay*, 1954 SC 388 : 1954 SCR 1055 : 1954 SCJ 480 : 1954 SCA 538 : 56 Bom LR 1184 : 1954 (1) MLJ 718.

Trustee—duties of.

A trustee must not mix private property with trust property, because if he does so, he undertakes a heavy burden of proving that any particular property is his, as distinct from the trust. (HIDAYATULLAH J.)

Narayan Bhagawant Rao v. *Gopal*, 1960 SC 100 : 1960 (1) SCR 773 : 1960 SCJ 263 : 1960 (2) SCA 153.

Trustee *de son tort*—Rights of.

A trustee *de son tort* or a *defacto* manager has certain rights. He can sue on behalf of the trust and for its benefit to recover properties and monies in the ordinary course of management. It is however one thing to say that because a person is a *defacto* manager he is entitled sue to recover a particular property or particular sum which would otherwise be lost to the trust ; it is quite another to say that he has the right to continue in *defacto* management indefinitely without any vestige of title. The Court will hesitate to make such a sweeping declaration. (BOSE J.)

Gopal Kishnaji Ketkar v. *Mahomed Jaffar*, 1954 SC 5 : 1953 SCJ 621.

TRUSTS ACT

S. 8—Trust of Managing Agency.

It is not correct to describe trust of a managing agency as a trust of an obligation. It is in truth a trust of property which carries with it certain obligations and in law there is no objection to creating a trust over property burdened with obligations, though if it is onerous by reason of such obligations, the trustee may be entitled to disclaim it. (VENKATARAMA AYYAR J.)

J. K. Trust v. *Commissioner of Income-tax & E. P. T. Bombay*, 1957 SC 846 : 1957 SCJ 845 : 32 ITR 535.

S. 11—duties of trustee.

A trustee cannot be asked to invest his own money for the benefit of the *cestui que trust*. (MAHAJAN J.)

Mathalone v. *Bombay Life Assurance Co.*, 1953 SC 385.

S. 26—Liability of co-trustee.

Under law the investment of funds by a trustee with himself would constitute breach of trust. But before a co-trustee can be made liable therefor some kind of knowledge or connivance or gross negligence or like contributing factor on his part has got to be made out. (JAGANNADHADAS J.)

Ranganathan Chettiar v. *Peria Karuppan Chettiar*, 1957 SC 815 : 1958 SCJ 58 : 1958 (1) MLJ 36 : 1958 (1) An WR 33.

S. 32—right to indemnity—when arises.

A trustee is not entitled to claim indemnity till he suffers an injury for which he has to be indemnified. (MAHAJAN J.)

Mathalone v. *Bombay Life Assurance Co.*, 1953 SC 385.

S. 90—whether applies to partners.

Whereas S. 88 makes a specific reference to partners, agents etc., S. 90, in terms, applies to a tenant for life, a co-owner, a mortgagee or any other qualified owner of any property. S. 90, therefore, in terms cannot apply to the case of partners. (SINHA J.)

C. G. Chetty v. *C. S. Chetty*, 1959 Sup 1 SCR 73 : 1959 SCJ 570 : 1959 SC 190 : 1959 (1) MLJ 188 : 1959 (1) An WR 188.

Renewal of lease by a partner.

There is no absolute rule of law or equity that a renewal of a lease by one partner must necessarily enure to the benefit of all the partners. There is a presumption of fact, as distinguished from a presumption of law that there is an equity in favour of the renewal of the lease enuring for the benefit of all the partners.

But such a presumption, being one of fact, is rebuttable and must therefore depend upon the facts and circumstances of each case. This position in English law has been substantially adopted in the Indian Trusts Act, particularly in sections 88 and 90. (SINHA J.)

C. G. Chetty v. *C. S. Chetty*, (*ibid.*)

Purchase by mortgagee in possession.

A simple mortgagee of a tenant's interest under the Bihar & Orissa Tenancy Act paid up the arrears of rent due to the landlord and obtained possession under S. 225 of the Act. Thereafter the property was sold for subsequent arrears of rent and purchased by the mortgagee. The mortgagor-tenant sued for redemption.

Held, S. 90 applied to the case and the defendant, a mortgagee in possession, when he purchased under the rent sale did not thereby extinguish the plaintiff's right to redeem because he was at that time standing in the plaintiff's shoes as a mortgagee in possession under S. 225 (1) of the Orissa Tenancy Act. Also there was no question of extinction by merger of a lower estate in a higher because what the defendant purchased was a tenant's interest and not the landlord's. (BOSE J.)

Sidha Kamalnayan v. *Bira Naik*, 1954 SC 336.

Purchase by usufructuary mortgagee.

The section read with illustration (c) clearly lays down that where an obligation is cast on the mortgagee and in breach of the obligation he purchases the property for himself, he stands in fiduciary relationship in respect of the property so purchased for the benefit of the mortgagor for no one can be allowed to benefit from his own wrongful act.

A usufructuary mortgagee of a tenant's interest was bound under the terms of the mortgage to pay the rent due to the landlord. He did not pay the rent with the result that the property was brought to sale for arrears of rent and the mortgagee purchased the property. The mortgagor sued for redemption and the mortgagee contended that the relationship of mortgagor and mortgagee ceased and that the suit for redemption was not maintainable.

Held (negativing the contention) :

The right to redeem was not extinguished, for the case attracted the provisions of S. 90 and in the eye of law the purchase in the rent sale must be deemed to have been made in trust for the mortgagor and therefore the suit for redemption was maintainable.

1954 SC 336 Followed ; 1956 Orissa 61 Affirmed. (SUBBA RAO J.)

Mrutunjay Pani v. *Narmada Balu*, 1961 SC 1353.

S. 94—just demands.

One P purchased through his agent certain shares in a company from one R. Before P's name was registered in the Company's books, the Company issued further shares and offered some of them, under S. 105-C of the Companies Act, 1913, to R. Meanwhile a solicitor, purporting to act on behalf of P and certain others, alleged to be the persons to whom the shares were sold, called upon R to apply for the new shares in his own name offering to indemnify R. R sent a reply stating that he was willing to sign the renunciation form in favour of the purchaser on being satisfied that those who were alleged to be the purchasers were the real purchasers. He did not apply for the new shares and P sued him in damages.

Held, even if R, as a constructive trustee, was under a duty to sign the renunciation form and send it to P, the requisition made on behalf of P was ineffective and inadequate. It was not possible for the trustee on the basis of that requisition to carry out the mandate of the *cestui que trust* and the trustee cannot be said to have defaulted in his duty.

1950 Bom. 76 Reversed. (MAHAJAN J.)

Mathalone R. v. *Bombay Life Assurance Company*, 1953 SC 385.

U.P. COURT OF WARDS ACT, 1912, **S. 56.**

The provisions of S. 56 are merely directory and not mandatory. Therefore omission to appoint a representative does not render as nullity the proceedings terminating in a compromise entered into by the Court of Wards on behalf of the ward. (SARKAR J.)

Drigraj Kuer v. *Amarkrishna Narain Singh*, 1960 SC 444 : 1960 (2) SCR 431 : 1960 (2) SCA 260 : 1960 SCJ 594 : 1960 All WR 283.

S. 61—Compromise between two wards.

The Court of Wards has power to effect a compromise between two of its wards. (SARKAR J.)

Drigraj Kuer v. *Amarkrishna Narain Singh*, (*ibid.*)

U.P. DISTRICT BOARDS ACT, 1922, **Ss. 90 and 71—Suspension pending appeal.**

The powers of dismissal and suspension given to the Board are defined and circumscribed by the provisions of sections 71 and 90 and have to be culled out from the express provisions thereof. It will not be legitimate to have resort to general or implied powers under the law of master and servant or S. 16 of the U.P. General Clauses Act.

The charges against the secretary of the Board were gone into and the Board passed two resolutions, one for his dismissal and the other for his suspension till the matter of his dismissal was finally decided under S. 71 on an appeal, if any, preferred by the secretary to the Government. *Held*, the order of suspension pending the appeal, if any, by the secretary was invalid. (BHAGWATI J.)

Hira Devi v. *District Board, Shahjahanpur*, 1952 SCR 1122 : 1952 SC 362 : 1952 SCJ 533 : 1953 SCA 6 : (1953) 1 All 642 : 1952 ALJ 717.

S. 91 (q) and U.P. Panchayat Raj Act, 1947, S. 15 (c) and S. 111.

S. 15 (c) of the Panchayat Raj Act does not provide for control and regulation of trades, callings and practices like S. 91 (q) of the District Boards Act. The

power to frame bye-laws under S. 111 of the Panchayat Raj Act is conditioned by the duties and functions imposed on *Gaon* Panchayat under sections 15 and 16 and other provisions in that Act and does not take away the power of the District Board under S. 174 to frame bye-laws and prescribe fees in respect of the trades of hulling rice, milling grains and extracting oil.

Also the fee charged by the District Board is for regulation of obnoxious trades and the purpose thereof is different from the purpose for which fees are levied under the Essential Supplies Act and the Pure Food Act and the fact that there may be some overlapping between the two regulatory provisions can have no relevancy on the validity of the licence fee charged under the District Boards Act. (WANCHOO J.)

District Board, Ghazipur v. *Lakshmi Narain Sharma*, 1961 SC 356.

Ss. 93 (3) and 174 (1) (k) and U.P. Town Areas Act, 1914, S. 26 (a).

A Town Area Committee being vested with powers under S. 26 (a) of the U.P. Town Areas Act, 1914, to regulate offensive trades or callings, its power must prevail over the power of the District Board under S. 174 (1) (k) of the District Boards Act. (WANCHOO J.)

Asa Ram v. *District Board, Muzaffar Nagar*, 1959 SC 480 : 1959 SCJ 452 : 1959 ALJ 361 : 1959 All WR 296.

S. 174 (2) (i)—Bye-law 2 of Muzaffarnagar District Board—validity.

Bye-law 2 made by the District Board, Muzaffarnagar, Uttar Pradesh, is void as it conflicts with the fundamental right of a citizen under Art 19 (1) (g) of the Constitution to carry on the business of holding a market.

(GHULAM HASAN J.)

Tahir Hussain v. *District Board, Muzaffarnagar*, 1954 SC 630.

U. P. LAND ACQUISITION (REHABILITATION OF REFUGEES) ACT, 1948, **S. 11 (1) Provisos—validity.**

The provisions of provisos to S. 11 (1) of the Act have been specifically saved from any attack on their constitutionality as a consequence of Art. 31-B read with the Ninth Schedule of the Constitution, as amended by Constitution (Fourth Amendment) Act of 1955.

1955 All. 12 Reversed ; 1955 SC 47 Applied. (KAPUR J.)

State of U.P. v. *Maharaja Brijendra Singh*, 1961 SC 14 : 1961 (1) SCJ 209 : 1960 ALJ 962 : 27 Cut LT 1.

U.P. MUNICIPALITIES ACT, 1916, **S. 294—Bye-law 8 (c) of the Khatauli Notified Area Committee.**

Revised bye-law 8 (c) framed by the Khatauli Committee cannot be supported under S. 294 of the Act. (S. R. DAS J.)

Sri Ram v. *Notified Area Committee, Khatauli*, 1952 SC 118.

S. 298—Bye-laws 2 & 4 of the Municipal Board of Kairana.

Bye-laws 2 and 4 violate the fundamental right of a person to carry on trade or business guaranteed by Art 19 (1) of the Constitution and are much more than reasonable restrictions as contemplated by Art 19 (6) and are therefore void. (S. R. DAS J.)

Rashid Ahmed v. *Municipal Board, Kairana*, 1950 SC 163 : 1950 SCR 566 : 1950 SCJ 124 : 63 LW 867.

S. 298 (2) (j) (d)—Bye-laws 1 and 4 of the Jalalabad Town Area Committee.

Bye-laws 1 to 4 which impose a fee on the wholesale dealer irrespective of any use or occupation by him of immoveable property vested in or entrusted to the management of the Committee including any public street, are *ultra vires* the Committee, infringe Art. 19 (1) (g) and cannot be said to be a valid law under Art. 19 (6) of the Constitution. (S. R. DAS J.)

Mohammad Yasin v. *Town Area Committee, Jalalabad*, 1952 SCR 572 : 1952 SC 115 : 1952 SCA 237 : 7 DLR SC 183 : 1952 SCJ 162 : 1952 ALJ 313 : BLR 1952 SC 149 : 1952 MWN 492.

Ss. 326 (3) and 58 (1)—Suit to set aside dismissal—Limitation.

An employee preferred an appeal to the State Government against the order of dismissal passed against him by the Municipal Board. After the dismissal of the appeal, he filed a suit for a declaration that the dismissal was wrongful. In answer to a plea of limitation, the plaintiff contended that the period of limitation under S. 326 (3) should be computed from the date of the dismissal of his appeal to the State Government and not from the date of dismissal by the Board.

Held (negativing the contention), the cause of action for the plaintiff was his wrongful dismissal by the Board and the mere filing of an appeal had not the effect of holding the order of the Board in abeyance or rendering it ineffective and as there was nothing in S. 58 which suspended the operation of the order of the Board or which barred his right of suit, the cause of action could not be said to have arisen only from the date of dismissal of the appeal to the State Government. Also, the analogy of a decree of a trial court merging in the decree of the appellate Court does not apply to the case. Even if it applies, as has been held in 1958 SC 86, it is only the decree of the trial court which remains operative, when it is merely affirmed by the appellate Court.

(1957) 2 All. 194 Affirmed. (BHAGWATI J.)

Sitaram Goel v. *Municipal Board, Kanpur*, 1959 SCR 1148 : 1959 SCA 238 : 1958 SC 1036 : 1959 SCJ 129 : 1959 ALJ 106 :

U.P. MUSLIMS WAQFS ACT, 1936, **S. 5 (2).**

"Any person interested in a *waqf*" in S. 5 (2) means any person who is interested in a transaction which is held to be a *waqf* by the Commissioner of *Waqfs*. (GAJENDRAGADKAR J.)

Siraj-Ul-Haq v. *Sunni Central Board of Waqfs, U.P.*, 1959 SCR 1287 : 1959 ALJ 83 : 1959 SC 198 : 1959 SCJ 367 : (1959) 1 All 8.

U. P. PREVENTION OF COW SLAUGHTER ACT, 1955 **(as amended by Amendment Act of 1958), S. 3—Validity.**

S. 3 in so far as it imposes unreasonable restrictions on the right of a citizen as to slaughter of bulls and bullocks infringes Art 19 of the Constitution and is to that extent void.

1959 SCR 629 Followed. (S. K. DAS J.)

Abdul Hakim Quaraishi v. *State of Bihar*, 1961 SC 448.

U.P. ROAD TRANSPORT ACT, 1951—**Constitutional validity.**

The Act violates the fundamental right of a citizen to carry on the business of transport in motor vehicles guaranteed under Art. 19 (1) (g) of the Constitution and is not shown to be protected by Art. 19 (6) as it stood at the time of the enactment and is therefore void.

The Act also conflicts with the provisions of Art. 31 (2) of the Constitution as the Act deprives the citizens of the business of running buses on hire without providing for any compensation, even though the Government may not under the statute deprive them of their buses or any other tangible property.

1954 All. 257 Reversed. (MUKHERJEA J.)

Saghir Ahmed v. *State of Uttar Pradesh*, 1954 SC 728 : 1955 SCR 707 : 1954 SCJ 819 : 1954 SCA 1218 : 68 LW 8 : 1954 (2) MLJ 628 : 1955 All WR 23 : 1955 ALJ 38.

Section 3.

S. 3 does not offend Art. 14 of the Constitution. (MUKHERJEA J.)

Saghir Ahmed v. *State of Uttar Pradesh*, (*ibid.*)

U.P. TOWN AREAS ACT, 1914, **S. 14 (1) (f)—Residence.**

On a proper construction of cl. (f) read with the limitation and restrictions embodied in the rules made under S. 39 it cannot be held that residence within a town area is a necessary condition for the imposition of tax under clause (f) of section 14 (1). (S. K. DAS J.)

Ramnarain v. *State of U.P.*, 1956 SCR 664 : 1957 SC 18 : 1956 SCJ 725 : 1956 SCA 1114 : 1957 BLJR 52 : 1957 All WR (HC) 63 : 1957 ALJ 1 : (1956) 2 All 695.

Rules under the Act—R. 53 (ii) (a).

Where the Tribunal found that the election of "A" was invalid on account of very serious misconduct on his part (namely "A" procured undue influence to be exercised on the electorate, and there was impersonation of absent voters and there was tampering with the register) and set aside the election of "A", it cannot be said to have acted wrongly in exercise of its powers when it declared as duly elected the candidate who had obtained the next largest number of votes.
(S. R. DAS AG.C.J.)

Saiyid Alimuddin v. *Saeed Ahmed*, 1955 SC 761.

U.P. TOWN IMPROVEMENT ACT, 1918, **Ss. 45 to 48 and 54A—Meaning of "vest."**

The word 'vest' is a word of variable import. It has not got a fixed connotation. It may vest in title or it may vest in possession or it may vest in a limited sense as indicated in the context in which it may have been used in a particular legislation. Under these sections the vesting of the property in the trust is only for the purpose of effecting an improvement scheme and not with a view to clothing it with complete title. Hence, where the Improvement Trust erects structures on Government land placed at its disposal with money advanced by the Government at interest to the Trust, the structures would be the property of the Government. Simply because the Trust erected the structures or paid up the amount advanced by the Government will not necessarily lead to the inference that the structures are the property of the Trust,

1953 SCR 185 Referred to. (SINHA J.)

Fruit and Vegetable Merchants Union v. *Delhi Improvement Trust*, 1957 SCR 1 : 1957 SC 344 : 1957 SCA 373 : 1957 SCJ 167.

U. P. TRANSPORT SERVICES ACT, 1955—**validity.**

The Act is not void as not satisfying the requirements as to compensation laid down by Art. 31 (2) of the Constitution (before the Constitution (4th Amendment) Act, 1955).

Deep Chand v. *State of Uttar Pradesh*, 1959 SC 648 : 1959 SCJ 1069 : 1959 SCA 377.

WAJIB-UL-ARZ—**entries in.**

Entry regarding an agreement in a *wajib-ul-arz* holds good during the period of the settlement in which it is made and becomes inoperative when the settlement has come to an end. (GHULAM HASAN J.)

Chhote Khan v. *Mal Khan*, 1954 SC 575 : 1955 SCR 60 : 1954 SCJ 577.

WALIUDDOWALA SUCCESSION ACT, 1950—**validity.**

The Act is constitutionally invalid as it offends Art. 14 of the Constitution.

1951 Hyd. 1 (F.B.) Affirmed. (MUKHERJEA J.)

Ameerunnissa Begum v. *Mahaboob Begum*, 1953 SC 91 : 1953 SCR 404 ; 1953 SCJ 61 : 1953 SCA 565 : (1953) Hyd 98.

WEST BENGAL LAND DEVELOPMENT AND PLANNING ACT, 1948,

S. 7—Preparation of a scheme.

S. 7 dispenses with the statutory necessity of preparing a scheme of development as envisaged in S. 5 of the Act in cases where the Government has taken the decision that it is necessary to proceed further with the acquisition proceedings without waiting for the preparation of a scheme.

There is no substance in the contention that discrimination is implicit in the provisions of S. 7.

1954 Cal. 248 Reversed. (SINHA C. J.)

State of West Bengal v. *Naba Kumar*, 1961 SC 16.

S. 8—validity.

The provision in S. 8 relating to the conclusiveness of the declaration of the Government as to the nature of the purpose of the acquisition is unconstitutional, inasmuch as under Art 31 (2) of the Constitution the existence of a public purpose is a necessary condition for the acquisition and such existence of a public purpose as a fact must be established objectively.

1951 Cal. 111 Affirmed. (PATANJALI SASTRI C. J.)

State of West Bengal v. *Mrs. Bella Bannerjee*, 1954 SC 170 : 1954 SCR 558 : 1954 SCA 41 : 1954 SCJ 95 : 1954 (1) MLJ 162 : 93 CLJ 264.

S. 8—proviso (b)—validity.

The latter part of proviso (b) to section 8 which limits the amount of compensation so as not to exceed the market value of the land on 31-12-46 no

matter when the land is acquired offends the provisions of Art 31 (2) of the Constitution and is therefore void.

1951 Cal. 111 Affirmed. (PATANJALI SASTRI C. J.)

State of West Bengal v. *Mrs. Bella Bannerjee*, (*ibid.*).

WILL

Construction.

It is seldom profitable to compare the words of one will with those of another or to attempt to find out to which of the wills, upon which decisions have been given in reported cases, the will in suit approximates closely. Cases are helpful only in so far as they purport to lay down certain general principles of construction which are now fairly well settled.

The cardinal maxim to be observed by Courts in construing a will is to endeavour to ascertain the intention of the testator. This intention has to be gathered primarily from the language of the document which is to be read as a whole without indulging in any speculation or conjecture as to what the testator would have done if he had been better informed or better advised.

(MUKHERJEA J.)

Gnanambal v. *Raju Ayyar*, 1951 SC 103 : 1950 SCR 949 : 1951 SCJ 171 : 6 DLR SC 175 : 1951 MWN 491 : 1951 (1) MLJ 333 : BLR 1951 SC 106.

It is no doubt true that in construing a will, if two constructions are reasonably possible and one of them avoids intestacy while the other involves intestacy, the Court would certainly be justified in preferring that construction which avoids intestacy. It may be possible to invoke this rule even in cases where the words used are ambiguous and an attempt may be made to remove the ambiguity by adopting a construction which avoids intestacy. Similarly with regard to the rule that vesting should not be postponed the position is exactly the same.

But this rule of construction cannot be treated as an absolute rule which should have overriding importance in construing a will and it is obvious that the Court cannot embark on the task of construing a will with a preconceived notion that intestacy must be avoided or vesting must be postponed. The intention of the testator and the effect of the dispositions contained in the will must be decided by construing the will as a whole and giving the relevant clauses in the will their plain grammatical meaning considered together. (GAJENDRAGADKAR J.)

Kasturi v. *Ponnammal*, 1961 SC 1302.

(**Note :** In the instant case the Court came to the conclusion that on a proper construction of the will there was a possibility of intestacy and that there was postponement of vesting, but that could not be avoided by resorting to the said rule of construction.)

Rules of construction—Succession Act, Ss. 82 to 85.

In construing a will, the court must bear in mind the rules of construction embodied in the Succession Act, namely, that the will should be read as a whole and all its parts are to be construed with reference to each other, that if a clause is susceptible of two meanings according to one of which it has some effect and according to the other of which it can have none, the former is to be preferred and finally that no part of the will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.

In construing a will, the court is not fettered by the technical rules of English law founded on the difference between realty and personalty. Its duty is to ascertain the true intention of the testator from the language used by him, regard being had to all the surrounding circumstances. (S. R. DAS C. J.)

Shirinbai v. *Nargacebai*, 1956 SCR 591 : 1956 SC 747 : 1956 SCA 1069 : 1956 SCJ 704 : 1956 SCC 440 : 1957 All WR 29 : (1956) 2 All 681 : 1956 (2) MLJ 67 : 70 LW 1 : 1957 ALJ 99.

Absolute estate.

The words in vernacular meaning "absolute owner" and generation after generation, no doubt, are descriptive of a heritable and alienable estate in the donee and they connote full proprietary rights unless there is something in the context or surrounding circumstances which indicate that absolute rights are not intended to be conferred. In all such cases the true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory.

In cases where the intention is to grant an absolute estate an attempt to reduce the powers of the owner by imposing restraint on alienation would certainly be repelled on the ground of repugnancy ; but where the restrictions are the primary things which the testator desires and they are consistent with the whole tenor of the will, it is a material circumstance to be relied upon for displacing the presumption of absolute ownership in the use of vernacular terms meaning "absolute owner". (MUKHERJEA J.)

Bajrang Bahadur Singh v. *Thakurain Bakhtraj Kuer*, 1953 SC 7 : 1953 SCR 232 : 1952 SCJ 655 : 1953 SCA 369 : 8 DLR SC 71 : 1953 ALJ 49 : 1953 AWR 85 : 1953 (1) MLJ 108 : (1953) 1 All 896.

Life estate or limited estate.

When the question is whether the testator's intention was to give his widow an ordinary life estate or an estate analogous to that of a Hindu widow, the primary duty of the Court is to ascertain it from the language employed by the testator, keeping in view the surrounding circumstances, his ordinary notions as a Hindu in respect to devolution of his property, his family relationships etc., in other words to ascertain his wishes by putting itself, so to say, in his armchair.

A will was in the following terms :—

"After my life-time, my wife R shall till her life-time enjoy my entire properties. After her life-time my daughter and her heirs shall enjoy them with absolute powers of alienation from generation to generation."

Held, as the widow R was not given powers of alienation for necessary purposes either expressly or by necessary implication, she cannot be held to have been given a full Hindu widow's estate and that the will conferred upon her only a life estate in the sense of the English law. (MAHAJAN J.)

Lakshmana Nadar v. *Ramier*, 1953 SC 304 : 1953 SCR 848 : 1953 SCJ 410 : 1954 SCA 811 : 8 DLR SC 417 : 1953 (1) MLJ 834 : 1953 MWN 609.

Persona designata—**gift to.**

The question as to whether a disposition in a will is to a person intended therein as a *persona designata* or by reason of his filling a particular legal status which turns out to be invalid is one of some difficulty. But the determination of the question in each individual case must ultimately depend on its own facts and the terms of the particular document containing the disposition.

(JAGANNADHADAS J.)

Ranganatha Chettiar v. *Peria Karuppan Chettiar*, 1957 SC 815 : 1958 SCJ 58 : 1958 (1) MLJ 36 : 1958 (1) An WR 36.

Subsequent conduct.

When once it is held that the language of a will is clear and unambiguous, evidence of the subsequent conduct of parties cannot be admitted for the purpose of limiting or controlling its meaning. (VENKATARAMA IYER J.)

K. Govindan Kaimal v. *T. T. Lakshmi Amma*, 1959 SC 71 : 1959 SCJ 63 : 1959 (Sup) 1 SCR 1 : 1960 Andh LT 692 : 1959 (1) MLJ 44 : 1959 (1) An WR 44 : 1959 Ker LJ 188 : 1959 KLT 9.

Usefulness of precedents.

The rule of construction of a will by analogy in the manner as more or less similar words were construed by the Courts in the wills dealt with in those decisions is a dangerous one to follow in construing wills differently worded and executed in different surroundings.

49 Ind. App. 25 Followed. (MAHAJAN J.)

Lakshmana Nadar v. *Ramier*, 1953 SC 304 : 1953 SCR 848 : 1953 SCJ 420 : 1954 SCA 811 : 8 DLR SC 417 : 1953 (1) MLJ 834 : 1953 MWN 609.

Illustrative case.

A will contained the following clauses :—

'Cl. 82 : I give my property "T" to "S". On the expiry of the term of office of the executors and trustees, S shall get the said property.

Cl. 10 : The legacies fixed herein shall have to be paid in full within 15 years and during these 15 years my estate shall be managed under the supervision of my executors. They shall pay up all the legacies from out of the income of my estate year after year and shall not be competent to sell any portion of my estate.'

Held, (i) the term "estate" in cl. 10 out of whose income the payments were to be met could not be considered to mean "properties other than "T", (ii) the estate including T was to vest in the executors for a period of 15 years and (iii) S was not entitled to possession of property "T" for a period of 15 years.

(MAHAJAN J.)

Purnendu Nath Tagore v. *Administrator General of West Bengal*, 1954 SC 41 : 1953 SCJ 638.

Execution—onus of proof.

The question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of the statutory provisions contained in sections 67 and 68 of the Evidence Act and sections 59 and 63 of the Succession Act. As in the case of other documents so in the case of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of satisfaction of the prudent mind in such matters. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound disposing state of the testator's mind and his signature as required by law, the court would be justified in making a finding in favour of the propounder. In other words the onus on the propounder can be taken to be discharged on proof of these essential facts.

But in cases where the execution of the will is surrounded by suspicious circumstances, such as shaky and doubtful signature of the testator, feeble and debili-

tated condition of the testator's mind, the dispositions made in the will appearing to be unnatural, improbable or unfair in the light of relevant circumstances etc., the presence of such circumstances tends to make the initial onus very heavy and unless it is satisfactorily discharged and all legitimate suspicions completely removed, the court will be reluctant to treat the document as the last will of the testator, even though it is true that if a *caveat* is filed alleging the exercise of undue influence, fraud or coercion such plea may have to be proved by the *caveator*. (GAJENDRAGADKAR J.)

Venkatachala Iyengar v. *Thimmajama*, 1959 (Sup) 1 SCR 426 : 1959 SC 443 : 1959 SCJ 507 : 1959 (2) SCA 1.

Joint will.

A will executed by three persons jointly was in the following terms :—

(1) We have hereby settled and agreed that all the properties acquired jointly and separately by us till now, and those which we may be so acquiring in future shall be held by us in our possession and under our control dealt with by us as we please till our death and that subsequent to our death, A, B, C, shall hold the properties in their possession and enjoy them hereditarily.

. . . . . .

(3) In the event of our effecting any transfers or alienations of the said properties either severally or jointly, the said A, B, C, shall have the right only in respect of the remaining properties."

It was contended that under the will all the three testators became joint owners of all the properties on which it operated.

Held (negativing the contention), (1) the will cannot be construed as a transfer *inter vivos* by the several testators of all their individual properties to themselves jointly as joint-tenants ; (2) the will did not refer to any joint properties of the testators but to properties jointly acquired by them—which is very different ; (3) the matter was concluded by the terms of clause 3 since, if the properties were intended to be impressed with the character of joint property, an alienation by any one of them singly would be incompetent ; and (4) it was because the legatees who were intended to take were the same persons that the three testators instead of each executing a separate will jointly executed it and therefore under the will on the death of each testator, the legatees mentioned would be entitled to the properties of the testator who dies. (VENKATARAMA IYER J.)

K. Govindan Kaimal v. *T. T. Lakshmi Amma*, 1959 SC 71 : 1959 SCJ 63 : 1959 (Sup) 1 SCR 1 : 1960 Andh LT 692 : 1959 (1) MLJ 44 : 1959 (1) An WR 44 :1959 Ker LJ 188 : 1959 KLT 9.

Mutual Will—what is.

A will is mutual when two testators confer upon each other reciprocal benefits, as by either of them constituting the other his legatee, that is to say, when the executants fill the roles of both testator and legatee towards each other. But where the legatees are distinct from the testators, there can be no question of a mutual will. (VENKATARAMA IYER J.)

K. Govindan Kaimal v. *T. T. Lakshmi Amma*, (*ibid.*)

Unregistered Will—Probative value.

To draw any inference against the genuineness of a will on the ground of its non-registration is wholly unwarranted. (S. R. DAS J.)

Ishwardeo Narain Singh v. *Kamta Devi*, 1954 SC 280 : 1953 ALJ 691 : 1 BLJ 690.

WORDS & EXPRESSIONS

"ala malik" & "adna malik".

See *Rajender Chand* v. *Mst. Sukhi*, 1956 SCR 889 : 1957 SC 286 : 1957 SCJ 119 : 1957 SCA 251.

"*force majeure*"

The expression "*force majeure*" is not a mere French version of the Latin expression "*vis major.*" It is undoubtedly a term of wider import. Strikes, breakdown of machinery which though normally not included in "*vis major*" are included in "*force majeure*". An analysis of the rulings on the subject shows that where reference is made to "*force majeure*" the intention is to save the performing party from the consequences of anything over which he has no control. That is the widest meaning that can be given to "*force majeure.*" (HIDAYATULLAH J.)

Dhanrajamal Gobindram v. *Shamji Kalidas & Co.*, 1961 SC 1285.

"Heirs."

The word "heirs" cannot normally be limited to issue only.
(MUKHERJEA J.)

Angurbala v. *Debabrata*, 1951 SC 293 : 64 LW 960 : 1951 SCR 1125 : BLR 1951 SC 285 : 6 DLR SC 273 : 1951 ALJ 132 : (1952) 2 Cal 209.

'Pending.'

A legal proceeding is 'pending' as soon as commenced and until it is concluded, i.e., so long as the Court having original cognizance of it can make an order on the matters in issue, or to be dealt with therein. (BHAGWATI J.)

Asgarali Nazarali v. *State of Bombay*, 1957 SCR 678 : 1957 SC 503 : 1957 SCJ 421 : 1957 SCA 783 : 1957 Cr LJ 605 : 1957 All WR 513 : 59 Bom LR 917 : 1957 (1) MLJ (Cr) 391.

ADDENDA

ACT OF STATE—**acquisition of Sovereignty.**

See *Pramod Chandra Deb* v. *State of Orissa*, 1962 SC 1288.

APPEAL—**New plea—construction of a document.**

Where the question raised by the appellant relates to the construction of a contract, the absence of a specific plea that he entered into it while he filled a particular legal character, cannot prejudicially affect the construction of the document creating the contract.

Bhagwan Singh v. *Rameswar Prasad Sastri*, 1959 SC 876.

ARBITRATION ACT, **S. 14(2)—oral intimation to counsel—sufficiency.**

The difference in the provisions of the two sub-sections with respect to giving notice indicates clearly that the notice which the Court is to give to the parties of the filing of the award need not be a notice in writing. The notice can be given orally. An intimation to the Counsel for a party amounts to notice to the party in view of O. III R. 5 of the C. P. Code. (RAGHUBAR DAYAL J.)

Nilkantha S. Ningashetti v. *Kashinath S. Ningashetti*, 1962 (2) SCR 551 : 1962 SC 666 : 1962 (1) SCJ 588.

S. 16(1)(c)—award unstamped and unregistered—whether can be remitted.

Under S. 16 an award can be remitted to the arbitrators only for reconsideration which can only be as to the merits of the award. Therefore where the arbitrators, in a reference by the court pursuant to an arbitration agreement filed in court, file an award which is unstamped and unregistered, an order under S. 16(1)(c) cannot be made remitting the award to the arbitrators with a direction to rewrite it on a stamped paper and resubmit it to court. Such an order cannot be supported even under S. 151 C.P.C.

(1945) 1 Cal. 454 Approved ; 1928 Nag. 166 Overruled. (SARKAR J.)

Rikhabdas v. *Ballabhdas*, 1962 SC 551 : 1962 (2) SCJ 311.

S. 19—Application to supersede the reference to arbitration made after the award is made by the arbitrator but before it is actually filed in Court—effect.

See *Subbarama Naidu* v. *Siddama Naidu*, 1962 SC 671.

Further arbitration—when may take place.

When it is said that the arbitrator is generally *functus officio* after he has made the award, it only means that he cannot change that award in any matter of substance himself. But that does not take away the court's power to remit the award for reconsideration under S. 16 or to refuse to supersede the reference even though the award is set aside leaving it to the parties to take such further action under the arbitration agreement for further arbitration if it is posible

to do so under the terms of the particular arbitration agreement. It cannot be contended that once the award is set aside there can be no further reference with respect to the dispute decided by the award which is set aside. The scheme of the Act is, whether the arbitration is under Chapter II, Chap. III or Chap. IV, to give discretion to the court to decide whether to supersede the reference or not. Where it decides to supersede the reference it has to order that the arbitration agreement shall cease to have effect with reference to the difference referred but where it decides not to supersede the reference, and the arbitration agreement and the reference subsist and if there is machinery provided in the arbitration agreement for making a further reference or for continuing the same reference, further arbitration can take place.

1958 Cal. 490, 1956 Mad. 369, (1959) Punj. 266 Approved. (WANCHOO J.)

Juggilal Kamlapat v. *General Fibre Dealers Ltd.*, 1962 (2) SCA 575 : 1962 SC 1123 : 1962 (2) SCJ 314.

S. 20(1)—nonjoinder of party interested.

There is no reason why where parties enter into an arbitration agreement knowing full well that there is another person who is interested but leaving him out the court should not send the parties to the forum chosen by them even if the other person who is interested and whose interest in the subject matter is not in dispute cannot be made party before the arbitrator. (WANCHOO J.)

Abdul Khader Shamsuddin v. *Madhav Prabhakar Oak*, 1962 (3) SCR 702 : 1962 SC 406 : 1962 (1) SCJ 620 : 64 Bom LR 267.

S. 20(4)—sufficient cause—what is—allegation of fraud.

The words of the sub-section leave a wide discretion in the court to consider whether an order for filing the agreement should be made and a reference made accordingly. It is neither neccessary nor desirable to lay down in general terms what would be sufficient cause which would entitle a court to refuse to order the agreement to be filed and thus refuse to make an order of reference. The court will have to decide the question on the facts of each case.

But where serious allegations are made aganist a party and that party desires that the matter should be tried in open court that would be sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference. But it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose the court to take the matter out of the forum which the parties themselves have chosen.

[On the facts, *held*, there were no such serious allegations of fraud in the case as would be sufficient for not referring the dispute to arbitration.]

(*Ibid.*)

S. 23(1)—fixation of time.

What is imperative under the section is the fixation of time for making the award. But it does not follow that where the court omits to specify the time in the order of reference but does so elsewhere in the proceedings, the reference is bad. (MUDHOLKAR J.)

Subbarama Naidu v. *Siddama Naidu*, 1962 SC 671.

S. 30—allotment of less than due share in the property.

See *ibid.*

Ss. 31, 32 & 33—application by party affirming arbitration agreement to determine its existence.

Having regard to the scheme of sections 31, 32 & 33 it will not be unreasonable to hold that in matters which fall within the bar created by S. 32 if a suit cannot be filed it is necessarily intended that an application can be made and that such an application can be made under the Court's powers under S. 31 and impliedly recognised by S. 32. On this construction, S. 33 cannot be treated as exhaustive of all cases where applications can be made and hence an application by a party affirming an arbitration agreement for determining the existence of the arbitration agreement is not incompetent. Further the fact that an incidental declaration is claimed about the existence and validity of the main contract containing the arbitration clause does not affect the essential character of the application.

1950 Cal. 267 and 1951 Cal. 147 Overruled ; (1950) Bom. 333 Approved.
(GAJENDRAGADKAR J.)

Jawaharlal Barman v. *Union of India*, 1962 SC 378.

S. 33—invalidity of the contract containing arbitration clause—effect on award—estoppel.

It is no doubt true that the expression "all matters etc. arising out of or concerning or in connection with or in consequence of or relating to this contract" in an arbitration clause contained in a contract is of sufficient amplitude to take in a dispute as to the validity of the main contract. But where the main agreement itself is invalid (*e.g.*, being forbidden by law) every part of it including the clause as to arbitration contained therein must also be invalid and therefore the dispute that the contract is illegal and void is not one which the arbitrator is competent to decide and a party is entitled to maintain an application under S. 33. It cannot be contended in such a case that the person is estopped from challenging the award on the ground that he appeared before the arbitrator and took part in the proceedings before him, for what confers jurisdiction on the arbitrator to hear and decide a dispute is a valid arbitration agreement and where there is no such agreement there is an initial lack of jurisdiction which cannot be cured by acquiescence. In such circumstances it cannot be contended that the person is estopped from questioning the validity of the award.

1960 (1) SCR 493 and 1960 (1) SCR 569 Ref. to. (VENKATARAMA IYER J.)

Khardah Co. Ltd. v. *Raymon & Co.*, 1962 SC 1810.

S. 34—stay—when may be refused.

See Arbitration Act, S. 20(4)—sufficient cause.

See *Abdul Khader Shamsuddin* v. *Madhav Prabhakar*, 1962 SC 407.

S. 39(1) (vi)—appeal when lies.

When no party files an objection praying for the setting aside of the award, no question of refusing to set it aside can arise and therefore no appeal is maintainable against an order that the award be filed and a decree be drawn up in its terms.
(RAGHUBAR DAYAL J.)

Nilkantha S. Ningashetti v. *Kashinath S. Ningashetti*, 1962 SC 666.

S. 39(2)—appeal to Division Bench from appellate order of single Judge of High Court.

The expression "second appeal" in S. 39(2) means a further appeal from an order passed in an appeal under S. 39(1) and not an appeal under S. 100 of the C.P. Code. The expression includes an appeal under the Letters Patent and it cannot be contended that the appeals contemplated by S. 39 are appeals to superior Courts and not *intra*-Court appeals. Therefore it is impossible to hold that notwithstanding the express prohibition contained in S. 39 (2), an appeal under the Letters Patent from an order passed in appeal under sub-section (1) by a single Judge, is competent. The absence of a saving clause in the Act similar to S. 4 or S. 104(1) of the C. P. Code also leads to the same conclusion. In this respect the Legislature has made a deliberate departure from the law prevailing before the enactment of the Act of 1940.

(1952) Bom. 570, (1945) Mad 564 and the dissenting view in (1961) Mad 809 (FB) Approved ; (1948) EP 159 and 1948 Lah 64 Overruled ; 1954 Punj 211 (FB) Reversed. (SHAH J.)

Union of India v. *Mohindra Supply Co.*, 1962 SC 256.

ASSAM LAND (REQUISITION AND ACQUISITION) ACT, 1948—**validity.**

The Act in so far as it provides for the requisition and acquisition of a tea estate or lands appertaining to it, is not *ultra vires* the State Legislature nor is it void as offending Art 31(2) of the Constitution. The Tea Act, 1953 (Central Act) cannot be described as one repealing or amending the Assam Act.

(SUBBA RAO J.)

Paresh Chandra Chatterjee v. *State of Assam*, 1962 (3) SCR 88 : 1962 SC 167 : 1962 (1) SCA 539.

BANKER AND CONSTITUENT—**Deposit—when created.**

When a person dealing with a Bank delivers money to the Bank, an intention to create a relation of creditor and debtor between him and the Bank is presumed, it being the normal course of the business of the Bank to accept deposits from its customers. But this presumption is one of fact arising from the nature of the business carried on by the Bank and is rebutted by proof of special instructions or circumstances attending the transaction, in which case a trust results.

Cases where presumption is rebutted enumerated.

One P paid into a Bank for transmission to another place with instructions to await his instructions regarding the opening of an account for keeping the same in fixed deposit or otherwise in the branch of the Bank at that place. No further instructions were given by him. In a suit by P for recovey of the sum the Bank contended that the amount lying with the Bank was a deposit within the meaning of a scheme sanctioned in the meanwhile for arrangement under Ss. 153 and 153A of the Companies Act 1913 for settlement of the liability by the Bank and was therefore liable to reduction in accordance with the scheme.

Held (negativing the contention), the transaction was primarily one of entrustment of the amount to the Bank for transmission to the other place. After the purpose was carried out in the absence of further instructions the Bank did not cease to be a trustee and it was immaterial that the Bank purported to open a fixed deposit account in P's name in its Branch at the other place and therefore P was entitled to recover the full amount. (SHAH J.)

New Bank of India v. *Pearey Lal*, 1962 SC 1003 : 32 Comp Cas 91 : 1962 (2) SCJ 122 : 1962 (2) MLJ 42.

BANKING COMPANIES ACT, 1949, **S. 34-A—validity.**

S. 34-A does not contravene Article 19(1)(c) or Art. 14 of the Constitution and is not constitutionally void. (AYYANGAR J.)

All India Bank Employees' Association v. *National Industrial Tribunal (Bank Disputes)*, 1962 SC 171.

S. 38(1) & (3)(iii)—whether offend the constitutional guarantee of equality.

There being a very clear cut and valid classification between Banking companies and non-Banking companies, the different procedure relating to winding up of Banking companies cannot be said to be discriminatory because it is based on differences which are related to the end sought to be achieved. The possibility that the procedure under S. 38(1) and (3) (b) (iii) may be invoked in some cases and the procedure of the Companies Act in others does not make any difference because the different procedures will be invoked to suit different situations. The provisions of S. 38(1) and (3)(iii) cannot be said to be a breach of Art. 14 of the Constitution.

1961 Kerala 268 Affirmed.

It cannot be said that the Reserve Bank would act arbitrarily from case to case. The Reserve Bank, apart from its being a reasonable body, is answerable to the Central Government and if it were to act malafide, the Central Government and in the last resort, the Courts will be there to intervene. If the power is abused by the Reserve Bank, what will be struck down would be the action of the Reserve Bank but not the law. (HIDAYATULLAH J.)

Joseph Kuruvilla Vellukunnel v. *Reserve Bank of India*, 1962 SC 1371.

Coustitutional validity.

The provisions cannot be declared as being unreasonable restrictions on the rights guaranteed by Art. 19(1)(g) and (f). Nor can they be declared *ultra vires* under Art. 301 because they are protected by Art. 302.

(*Ibid.*)

BAR COUNCILS ACT, **S. 14 (1)(b)—advocate of Chief Court of Sind.**

Even though an advocate of the former Chief Court of Sind had a right on 14.8.47 to practise in the Courts subordinate to any High Court in India, such a right ceased after the India (Adaptation of Existing Indian Laws) Order, 1947. (DAS GUPTA J.)

Jethanand Betab v. *Judges of Punjab High Court*, 1962 SC 742 : 1962 (2) SCJ 140.

BENAMI TRANSACTION—**both parties equally guilty—suit for possession by transferee—guiding principles.**

Where a transaction is the result of a fraudulent plan to which both the transferor and the transferee agreed and the fraud initially contemplated is perpetrated and the transferee sues to recover possession and the claim is resisted on the ground that the conveyance is void having been effected for a fraudulent

purpose which has been carried out, there is a battle of legal maxims, such as, *ex dolo malo non oritur actio*, or, *ex turpi causa non oritur actio*, or, *in pari delicto potior est conditio possidentis*, and *nemo allegans suam turpitudinem audiendus est*.

The proper approach of the Court in determining such disputes must be conditioned solely by considerations of public policy and the paramount consideration of public interest requires that the plea of fraud should be allowed to be raised and tried and if it is upheld, the estate should be allowed to remain where it rests. The plaintiff, in such circumstances, will have to fail.

1775 (1) Cowp. 341 Referred to with approval ; (1941) Bom. 575 (FB), 8 Cal. WN 620, 45 All 396, 13 Lah 713 (FB), 1943 Nag 113, 30 Pat 137, 10 Mad 17, 20 Mad 326 and 32 Mad 323 Approved ; 31 Bom. 405, 32 MLJ 484, 56 Mad 646 and 59 Mad 289 Overruled.

(GAJENDRAGADKAR J.)

Immani Appa Rao v. *G. Ramalingamurthi*, 1962 SC 370.

BENGAL CHAMBER OF COMMERCE ARBITRATION RULES, **R. 10—second arbitration.**

Under the rule it is open to the Registrar to appoint a fresh arbitration tribunal where the earlier tribunal had become incapable of acting in view of the fact that its award has been set aside on the ground of misconduct.

1959 Cal. 169 Not Approved. (WANCHOO J.)

Juggilal Kamlapat v. *General Fibre Dealers Ltd.*, 1962 SC 1123.

BERAR LAND REVENUE CODE, 1928, **Ss. 174 and 173—validity.**

The right of pre-emption created under the Code is in reality in favour of a cosharer strictly so called or some one who is akin to a cosharer. Moreover the right arises only for unalienated lands held for agricultural purposes and therefore would result in consolidation of holdings within a survey number which is generally of an extent of thirty acres. Hence the law of pre-emption provided in Chapter XIV of the Code is a reasonable restriction in public interest of the right guaranteed by Art. 19(1)(f) of the Constitution and is valid.

1955 Nag 225 (FB) Approved. (WANCHOO J.)

Sukhdeo Narayan Patil v. *Moti Ram* (*Bhau Ram* v. *Baijnath*), 1962 SC 1476.

BIHAR GOVERNMENT SERVANTS CONDUCT RULES, 1956, **R. 4-A—validity.**

The rule laying a ban on every type of demonstration, however innocent the same may be, and not confining itself to those forms of demonstrations which might lead to a breach of public tranquility or which would fall under other limiting criteria specified in Art. 19 (2) of the Constitution is violative of the fundamental right guaranteed under Art. 19(1)(a) and (b). As it is not possible to so read it as to separate the legal from the unconstitutional portion of the provision, the entire rule has to be struck down as unconstitutional.

1959 Patna 187 Reversed.

But the rule in so far as it prohibits a strike cannot be struck down, since there is no fundamental right to resort to a strike.

1959 Patna 187 Approved. (AYYANGAR J.)

Kameswar Prasad v. *Union of India*, 1962 SC 1166.

BIHAR AND ORISSA CO-OPERATIVE SOCIETIES ACT, 1935, S. 48(1)(e) and Explanation (as amended by Act XVI of 1948)—dispute between registered society and non-member.

The explanation cannot be read as adding a new head to the categories (a) to (e) under S. 48(1) of disputes which may be referred to the Registrar. The addition of the word non-member by the amending Act to the first explanation has not enlarged the scope of the main S. 48 (1) so as to make all kinds of disputes between a registered society and a non-member cognisable by the Registrar thus excluding the jurisdiction of the ordinary Civil Courts. Therefore a claim which is not of the description referred to in S. 16 (1) read with S. 2 (c) by a registered society (which is not a financing Bank) against any non-member who is not an agriculturist, is not within the purview of S. 48 (1) read with the explanation and as such cannot be referred to the Registrar.

40 Patna 7 Overruled. (SINHA C. J.)

Sugauli Sugar Works v. *Assistant Registrar, Co-operative Societies, Motihari*, 1962 SC 1367.

BOMBAY AGRICULTURAL PRODUCE MARKETS ACT, 1939, S. 26—Notification d-23-6-61—validity.

The notification by itself cannot to be said to be discriminatory because the imposition of the fees still remains to be made by the market committee under S. 11 subject to the maxima prescribed in the notification. The notification is not, therefore, hit by Art. 14 of the Constitution. (WANCHOO J.)

Muhammadbhai K. Chhipa v. *State of Gujarat*, 1962 SC 1517.

S. 29B (as introduced by Ordinance I of 1961)—scope.

S. 29B is sufficient to cure the defects arising from Rules 65 and 67 being declared *ultra vires* by the Supreme Court in 1962 SC 97 and to validate actions taken and things done before the Ordinance which would otherwise have been invalid in view of that judgment.

(*Ibid.*).

Validity.

Retrospective power of the Legislature to make a law being there even in the case of taxation, sub-section (3) of S. 29B which validates the collection and levy of licence fees already made cannot be held to be invalid under Art. 31 (1) of the Constitution.

(*Ibid.*).

Act (as amended by Ordinance I of 1961)—validity.

So long as the rules framed under the Act stand as they are, S. 5A has to be read along with the Rules. Thus read it is clear that there has been no radical departure from the scheme of the Act as it was before the amendment and therefore the reasons which impelled the Supreme Court in 1962 SC 97 to uphold the validity of the Act, Rules and Bye-laws framed under it still stand. The Act, as amended, therefore, does not amount to an unreasonable restriction on the right to carry on trade.

(*Ibid.*).

Rules under the Act, R. 53(1) (as amended by notification d-23-6-61)—validity.

The fact that under this rule the market committee may levy fees by one method on one agricultural produce and by another method on another produce will not be a ground of discrimination for each commodity must be treated as a class by itself.

It is true that there is nothing in the rule expressly to prevent the committee from using two of the modes prescribed therein for the purpose of levying fees on the same produce. But the chances of its fixing two modes for the levy of fees even on the same produce in such a way as to result in discrimination are so remote that the notification cannot be struck down on that account as discriminatory. In such a case it is not the notification which will have to be struck down but the actual bye-law levying two different rates.

(*Ibid.*).

Rule 64—Validity.

Rule 64 cannot be held to be invalid on the ground that the market committee is using that rule to control retail trade.

(*Ibid.*).

Rules 65 (1) and 67(1)—effect of Ordinance I of 1961 on validity.

Rules 65(1) and 67(1) which were valid when originally framed and remained valid became invalid on the insertion of S. 5A in the Act in 1953. On the section being amended by Ordinance I of 1961 they revived by the application of the doctrine of eclipse.

(*Ibid.*).

Bye-laws—classification of traders—validity.

There is no discrimination in the creation of two classes of traders for there is a fair basis of classification of traders into A class and B class.

(*Ibid.*).

BOMBAY DISTRICT MUNICIPAL ACT, 1901, **S. 59 and S. 73—When Government may prohibit imposition of tax.**

The word "impose" in S. 59 means the actual levy of the tax after authority to levy it has been acquired by rules duly made and sanctioned and it is such imposition that is made subject to the general or special orders of Government. Therefore the Government can at any time by any such order prohibit the imposition of the tax.

S. 73 cannot be construed as negativing by implication this right of Government for it refers to and comprehends a totally different subject matter.

1956 Bombay 368 Affirmed.

Municipality of Anand v. *State of Bombay*, 1962 SC 988 : 64 Bom LR 688.

BOMBAY PREVENTION OF EX-COMMUNICATION ACT, 1949—**validity.**

The Act violates Art. 26 of the Constitution and is void.

1953 Bom. 183 Overruled.

Syedna T. Saifuddin v. *State of Bombay*, 1962 SC 853.

BOMBAY PUBLIC TRUSTS ACT, 1950, S. 9(4)—**"political purpose."**

A "political purpose" is not a charitable purpose as being one "for the advancement of any other object of general public utility" within S.9(4) and therefore a trust whose activities are directed to the spreading of political education through newspapers and thereby making people alive to their political rights is not a public trust within the meaning of the Act requiring to be registered with the Charity Commissioner.

Case law Discussed ; 1957 Bom. 83 Reversed. (AYYANGAR J.)

Laxman Balwant Bhopatkar v. *Charity Commissioner, Bombay*, 1962 SC 1589.

CALCUTTA MUNICIPAL ACT, 1923, **S. 127 (a)—gross rent at which building may reasonably be expected to let.**

The rental value under S. 127(a) cannot be fixed higher than the Standard Rent under the Rent Control Act.

(1922) 2 AC 93 Distinguished ; 1956 Mad 49 and (1951) Bom. 713 Not Approved ; 1 Rang 668 (FB) Approved ; 1957 Cal. 466 Affirmed. (SUBBA RAO J.)

Corporation of Calcutta v. *Smt. Padma Devi*, 1962 SC 151.

"at the time of assessment."

The assessment commences with the making of the valuation under S. 131 and ends with the determination of the objections under S. 140 and therefore where during this period standard rent for the building is fixed under the Rent Control Act that may be relied upon for assessing the value under S. 127(a).

(*Ibid.*).

CITIZENSHIP ACT, 1955, **S. 9 and Rule 3 in Sch. 3 of the Citizenship Rules—validity.**

S. 9(2) and Rule 3 of Sch. 3 in the Rules are both *intra vires*.

1962 SC 1052 Followed ; 1957 Andh. Pr. 1047 Reversed.

Govt. of Andhra Pradesh v. *Syed Mohd. Khan*, 1962 (2) SCA 418 : 1962 SC 1778.

Power of State Government in the absence of decision of Central Government.

It does not mean that as soon as it is alleged that a passport has been obtained by a person from a foreign Government, the State Government can immediately proceed to deport him without the necessary enquiry by the Central Government. The question as to whether a person has lost his citizenship of this country and acquired the citizenship of a foreign country has to be tried and decided by the Central Government and it is only thereafter that the State Government can deal with that person as a foreigner. It may be that if a passport is obtained from a foreign country by a citizen and the case falls under Rule 3, the conclusion may follow that he has acquired the citizenship of the foreign country but that conclusion can be drawn only by the appropriate authority authorised under the Act to enquire into the question.

Order in 1957 Andh. Pr. 1047 sustained. (GAJENDRAGADKAR J.)

Izhar Ahmed v. *Union of India*, 1962 SC 1052.

S. 9 (2)—validity.

It cannot be held that in enacting S. 9(2) the Legislature has abdicated its essential legislative function in favour of the rule making authority.
(GAJENDRAGADKAR J.)

(*Ibid.*).

CITIZENSHIP RULES, 1956, **Sch. III, R. 3—validity.**

Rule 3 is a rule of evidence properly so called and is not a rule of substantive law and as such cannot be challenged as being outside the scope of the authority conferred on the Central Govt. by S. 9 (2) of the Citizenship Act, 1955.

Observations of THOMPSON J. in (1835) 9 Law Ed 276 Explained ; (1957) Andh Pra 755 and 1960 All 637 Overruled ; (1958) Bom 1422, (1958) Raj 928 and (1960) Mad 697 Approved. (GAJENDRAGADKAR J.)

(*Ibid.*).

CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1930, **R. 49.**

Rule 49 does not confer a right but only a safeguard to a public servant that punishment by way of withholding of promotion shall not be imposed upon him unless he has been given an adequate opportunity to show cause. It comes into play only when proceedings are taken by way of disciplinary action. Otherwise it is not applicable. (SINHA C. J.)

High Court, Calcutta v. *Amal Kumar Ray*, 1962 SC 1705.

Rule 55A—applicability to judicial service.

Rule 55A enacted in 1948 by the Governor General is not applicable to the judicial service in West Bengal.

(*Ibid.*).

CIVIL PRO. CODE, **Ss. 2(5) and 13—foreign court—when competent.**

Where the defendant is not a subject of the country in whose courts a suit is brought, nor is a resident in that country, nor was temporarily present in that country when the process is served on him, nor did he in his character as a plaintiff in the foreign action select the forum where judgment is given against him, nor did he voluntarily appear in that court, nor had he contracted to submit to the jurisdiction of the foreign court, the foreign court will not be a court of competent jurisdiction and a decree passed by that court will be a nullity.

Halsbury's Laws of England (3rd Edn.) Vol. III p. 144 para 257 Referred to.
(KAPUR J.)

Maloji Narsing Rao v. *Shankar Saran*, 1962 SC 1737.

S. 2 (11)—legatee of a portion of the estate.

There is no justification for holding that the word "estate" in S. 2 (11) in the context must mean the whole of the estate and therefore a legatee who obtains only a part of the estate of the deceased under a will can certainly be said to represent the estate of the deceased even as intermeddlers are said to represent the estate even though they are in possession of parcels of the estate only.

1950 Mad 541 Overruled. (GAJENDRAGADKAR J.)

Andhra Bank Ltd. v. *Srinivasan*, 1962 SC 232 : 1962 (3) SCR 391 : 1962 (2) SCJ 676.

S. 11—Competence of the former court must be to try the whole of the subsequent suit—second suit in superior court.

Having regard to the legislative background of S. 11 it must be held that the word "suit" in the context must be construed literally and not liberally and it denotes the whole suit and not a part of it or a material issue arising in it. Therefore it is the whole of the subsequent suit which should be within the competence of the former court at the earlier time and not a part of it.

1943 Oudh 338 (FB) impliedly Overruled.

A suit for rent based on a rent deed was filed in the Court of Munsif and the final judgment in the suit dismissing the suit put a particular construction on the rent deed in suit. Thereafter the plaintiff filed another suit on the same rent deed for recovery of a higher amount of rent before a superior Court. The plea of *Res Judicata* was taken in defence.

Held (negativing the plea), as the Munsif who tried the earlier suit was not competent to try the subsequent suit, having regard to the limits of his pecuniary jurisdiction, the decision in the previous suit did not operate as a bar to the trial of the subsequent suit.

1952 Raj 115 Affirmed. (GAJENDRAGADKAR J.)

Gulab Bai v. *Manphool Bai*, 1962 (3) SCR 483 : 1962 SC 214 : 1962 (1) SCJ 627.

Decision in probate proceedings—subsequent suit on title.

Questions of title are not decided in proceedings for the grant of probate or letters of administration. A decision therein will not bar a person from raising the same question in a subsequent suit on title.

Hem Nolini Judah v. *Mrs. Isolyne S. Bose*, 1962 (2) SCA 490 : 1962 SC 1471 : 1962 ALJ 695 : (1962) 2 All 683.

General principles—when can be relied upon.

In dealing with a suit the only ground on which *Res Judicata* can be urged against such a suit can be the provisions of S. 11 and where it is inapplicable it will not be permissible to rely upon the general doctrine of *Res Judicata*.
(GAJENDRAGADKAR J.)

(In the instant case the previous suit was by the authors of a trust against the trustee and alienees and the later suit was by the beneficiary for similar reliefs, but it was held that the general principles of *Res Judicata* could not be invoked to bar the second suit.)

Janakirama Iyer v. *Neelakanta Iyer*, 1962 SC 633.

Ss. 13, 43 & 44—foreign judgment—decree passed in Native Indian States before 1950.

A decree was passed by a court in Gwalior on 18-11-48 and it was sought to be executed in 1951 in a court in Uttar Pradesh and the Gwalior court on 14-9-51 passed an order of transfer of the decree to the court in U.P. It was contended on behalf of the decree-holder that the decree was executable in U.P. on the following grounds ;—

(1) As a consequence of the Constitutional documents executed by the Rulers of Indian States before the date of the decree, Gwalior had become a part of India and therefore a decree passed by a court of that State was not a foreign decree.

(2) As a result of the coming into force of the Constitution Gwalior became comprised in a Part B State and the decree of the Gwalior court, even if it was a nullity originally, ceased to be so and became executable in U.P.

(3) The decree of the Gwalior court was a valid decree according to the law then in force in Gwalior and was not an absolute nullity but there was an impediment to its executability which was removed as soon as Gwalior became a part of the Union of India.

(4) By subsequent changes in the Indian Civil Procedure Code consequent on the promulgation of the Adaptation of Laws Orders of 1950 and the passing of the C.P.C. (Amendment) Act, 1951, the Gwalior court became competent to transfer its decrees for execution in U.P. ; and

(5) By virtue of Art 261 the decree passed by the Gwalior court was executable.

Held (negativing the contentions) :

(a) The Constitutional changes did not effect any change in the status or nationality of the Gwalior court till after the passing of the decree since the United State of Madhya Bharat (which comprised Gwalior also) was not comprised in the "Territory of India" till after the Constitution came into force on 26.1.1950.

1953 SCR 1188, 1955—1 SCR 415 and 1959 Sup 2 SCR 270 Ref. to.

(b) There is no retrospective effect of the Constitution including its definition of the words "Territory of India" which has the effect of converting what was a foreign judgment before the Constitution of India to a domestic judgment after the Constitution.

1954 Cal 67 Approved.

(c) The decree of the Gwalior court was in the international sense a nullity outside Gwalior though according to the law in that State it was not so. It was incorrect to say that it suffered only from the defect of unenforceability by execution ; it suffered from a more fundamental defect of being a nullity.

1953 SC 441, (1956) Punj 434 and 1955 Nag 103 Ref. to.

(d) The Gwalior court which made the order of transfer in September 1951 when it was governed by the Indian Code was a different court from what it was at the time it passed the decree when functioning under a different Code of Civil Procedure and as the words in S. 43, C.P.C. "Any decree passed by a Civil Court in a Part B State" cannot be read as "any decree passed by a Civil Court in what became a Part B State", the provisions of S. 43 could not be invoked. Nor could S. 44 be availed of as the section as amended by Act II of 1951 had no application to decrees of Civil Courts.

(e) Art 261 of the Constitution is prospective and not retrospective and it applies to decrees passed after the Constitution and not before.

Held, the decree could not be executed in U.P.

1958 All 775 Affirmed. (KAPUR J.)

Maloji Narsing Rao v. *Shankar Saran*, 1962 SC 1737.

Ss. 21 and 47—objection as to lack of territorial jurisdiction—waiver.

The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seizin of the case because the subject matter

was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit was instituted or decree passed or some such other ground which would have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it. But an objection as to its territorial jurisdiction is one which does not go to the competence of the court and can therefore be waived.

A suit was instituted in the Bombay High Court after obtaining the necessary leave under clause 12 of the Letters Patent. It was contested and after certain arbitration proceedings a decree was passed. It was transferred to Agra for execution where objection was raised that the Bombay High Court had no jurisdiction to entertain the suit and that therefore the decree was a nullity.

Held, (negativing the contention), the defendant by his conduct must be deemed to have waived his objection to the territorial jurisdiction of the court raised by him in his written statement, when he agreed to refer the matter to arbitration through court.

1955 All 569 Affirmed. (SINHA C. J.)

Hiralal Patni v. *Sri Kalinath*, 1962 SC 199.

S. 79(b) & O. XXVII—Suit Against Part C State (before the States Reorganisation Act, 1956).

A suit was brought against the State of Vindhya Pradesh in respect of a contract entered into by it with the plaintiffs. It was contended that the Central Government was the proper defendant.

Held (negativing the contention), the State of Vindhya Pradesh could be legally sued.

1956 Vindh. Pra 1 Affirmed. (HIDAYATULLAH J.)

State of Vindhya Pradesh v. *Moula Bux*, 1962 (2) SCR 794 : 1962 SC 145 : 1961 (2) SCJ 549.

S. 92—disputed question of title.

In a suit for the settlement of a scheme under S. 92, it is not appropriate for the court to investigate disputed questions of title to property which is in the hands of transferees who are not parties to the proceeding under S. 92.

(MUDHOLKAR J.)

Sree Kalimata Thakurani of Kalighat v. *Jibandhan Mukherjee*, 1962 SC 1329.

Framing of a scheme—inclusion of *shebaits*.

The existing *shebaits* and their predecessors had been functioning as *shebaits* in a temple for a very long period, and their rights in that regard had not been called in question ever before. It was contended that they should be excluded from the committee of management constituted by the scheme on the grounds (1) that they were only *de facto shebaits* and not *de jure shebaits* and (2) that as they had alienated debuttar property, it would be against the interest of the Deity to allow them to have a share in the management.

Held, whatever may be the true position as to the legal right of the *shebaits* to act as such, the contention that they should be completely excluded from management could not be accepted and (2) as the question of title could not be decided in the absence of the alleged transferees, this question also could not be decided and the contention had to be rejected.

(In the instant case, however, the Supreme Court observed that the *shebaits*

were over represented in the managing committee proposed by the court below and reduced their number.)

(*Ibid.*)

Direction regarding acts of *shebaits*.

If any person wants to challenge the right of a *shebait* to do any act as such *shebait* it is open to him to pursue such remedy as may be available to him at law and a direction cannot be made with respect to such a matter in a scheme framed under S. 92.

(*Ibid.*)

S.100—Question of law.

It is well settled that the construction of a document of title or of a document which is the foundation of the rights of parties necessarily raises a question of law. (MUDHOLKAR J.)

Chunilal V. Mehta v. *Century Spinning and Manufacturing Co. Ltd.*, 1962 SC 1314.

S. 141—applicability to proceedings in execution.

S. 141 does not apply to proceedings in execution. (MUDHOLKAR J.)

Dokku Bhushayya v. *K. Ramkrishnayya*, 1962 SC 1886.

S. 151—inherent power to issue an injunction.

The Courts have inherent jurisdiction to issue temporary injunctions in circumstances which are not covered by the provisions of Or. XXXIX. There is nothing in S. 94 or in Or. XXXIX Rules 1 and 2 which provide specifically that a temporary injunction is not to be issued in cases which are not mentioned in those rules. Further the provisions of S. 151 make it clear that the inherent powers are not controlled by the provisions of the Code.

1961-1 SCR 884 Explained and Relied on ; 62 Ind App 80 Distinguished ; 1926 Mad 258, 1932 Mad 180, 56 Mad 563, 1938 Mad 190 and (1949) Mad 316 Overruled ; (1940) All 201, (1940) All 232, (1941) 1 Cal 490 and 1952 Cal 560 Approved. (RAGHUBAR DAYAL J.)

Manoharlal Chopra v. *Seth Hiralal*, 1962 SC 527.

Injunction restraining party from proceeding with another suit.

The question of issuing an order to a party restraining him from proceeding with any other suit in a regularly constituted court of law deserves great care and consideration and such an order is not to be made unless absolutely essential for the ends of justice.

(In the instant case the Supreme Court set aside the grant by the High Court of a temporary injunction restraining the defendant from proceeding with a suit earlier instituted by him against the plaintiff in another court).

(*Ibid.*)

Remitting unstamped award—whether permissible.

See *Rikhabdas* v. *Ballabhdas*, 1962 SC 551.

Ss. 152 and 151—amendment after filing of appeal.

An error which was the result of inadvertence in the drafting of the decree can be corrected by the court even though an appeal may have been preferred from the said decree before the date of correction. (GAJENDRAGADKAR J.)

Janakirama Iyer v. *Neelakanta Iyer*, 1962 SC 633.

O. I R. 10—applicability to proceedings under Or. XXXIII.

It cannot be contended that the rule cannot properly be resorted to (for transposing a party) in a petition for leave to sue in *forma pauperis*. (SHAH J.)

Vijai Pratap Singh v. *Dukh Haran Nath Singh*, 1962 SC 941.

O. VI R. 4—improper conduct.

As in the case of fraud, where improper conduct is alleged, it must be set out with all particulars.

64 Ind. App. 143 Ref. to. (SARKAR J.)

Union of India v. *P. K. More*, 1962 SC 630.

O. VII R. 7—construction of prayer clause.

In construing a plaint regard must be had to all the relevant allegations made therein and the court must look at the substance of the matter and not the form.

A debtor executed a deed of trust conveying all his properties to certain trustees authorising them to dispose of the assets and distribute the proceeds rateably among the creditors. Some of the properties were accordingly sold. A creditor brought a suit impeaching the alienations. The prayer in the plaint was that the properties should be adjudged as still impressed with the trust and that an administrator should be appointed to recover possession of the properties and to resell them. The valuation of the suit for purposes of court fees and jurisdiction was made in respect of the several items of properties under S.7 (5) of the Court Fees Act. The sons of the alienees were also impleaded on the ground that they were in possession of the said properties. The question was whether the suit was one for a mere declaration falling within Article 120 of the Limitation Act or included a prayer for possession falling within Art. 134.

Held, reading the plaint as a whole, it would be unreasovable to hold that the suit was one on which a mere claim for a declaration was made.

(GAJENDRAGADKAR J.)

Janakirama Iyer v. *Neelakanta Iyer*, 1962 SC 633.

O. VIII R. 3—denial of general allegations.

A plaintiff cannot complain if general allegations made by him in the plaint are answered by equally general allegations in the written statement.

The plaintiff, a dismissed Government servant, stated in his plaint that "the order of removal was in violation of Arts. 14 and 16 of the Constitution inasmuch as the plaintiff was arbitrarily picked out and sacked", but gave no particulars about the alleged discrimination. In the written statement this allegation was dealt with in the following words : "The defendant denies that the order of removal was in violation of Arts. 14 and 16". It was contended that the defendant, as the pleadings stood, must be deemed to have admitted the allegation that the plaintiff had been subjected to hostile discrimination.

Held, if the plaint is to be construed as containing a sufficient allegation of discrimination, the written statement should be understood as denying it. As

the plaintiff had failed to establish on the evidence his case of discrimination, the suit must be dismissed.

1959 Bom 134 Reversed. (SARKAR J.)

Union of India v. *P. K. More*, 1962 SC 630.

O. XXI Rr. 89 to 91—nature of proceedings.

An application filed by a judgment debtor for setting aside a sale is a proceeding in execution of a decree.

Dokku Bhushayya v. *K. Ramakrishnayya*, 1962 SC 1886.

O. XXVI R. 13—partition suit—scope of commission.

Where the court only directs the Commissioner to submit his proposals for partition of the property and for that purpose authorises him to ascertain the property which is available for partition and to ascertain the liabilities of the joint family, it cannot be said that the court has abdicated its functions to the Commissioner, for the Commissioner is merely called upon to make proposals for partition on which the parties would be heard and the court would adjudicate upon such proposals in the light of the decree and the contentions of the parties. The proposals of the Commissioner cannot from their very nature be binding upon the parties nor the reasons in support thereof. (SHAH J.)

Munnalal v. *Rajkumar*, 1962 SC 1493.

O. XXXII R. 7—applicability to execution proceedings.

An execution proceeding being only a continuation of a suit, the rule applies to an agreement entered into during the pendency of execution proceedings.

26 Bom 109 Approved. (SUBBA RAO J.)

Dokku Bhushayya v. *K. Ramakrishnayya*, 1962 SC 1886.

Does not apply to procedural steps in suit or execution proceedings.

Consistent with the purpose of the rule, the words "with reference to the suit" must be limited to the rights put in issue in the suit. It cannot be said that agreements in respect of mere procedural steps in the conduct of the suit such as adjournment, admission of documents, interlocutories, inspection etc. should also conform to the requirements of the rule.

In the case of execution proceedings mere procedural steps not affecting the rights or liabilities ascertained or declared by the decree are not governed by the rule and a guardian may, without leave of court, agree to an adjournment of sale, to a waiver of fresh proclamation, to a reduction of upset price etc.

(*Ibid.*)

Withdrawal of application to set aside execution sale.

Application by guardian of minor defendant to set aside sale in execution of decree against the minor—Agreement between guardian and decree-holder and auction purchaser resulting in petition being withdrawn—Leave of court not obtained—Agreement not invalid.

See (*ibid.*)

O. XXXIII—nature of application—whether a suit—applicability of O. I R. 10.

An application for leave to sue in *forma pauperis* is but a method prescribed by the Code for institution of a suit by a pauper without payment of court fee. If the claim made by the applicant that he is a pauper is not established the petition must fail. But there is nothing personal in such an application. The suit commences from the moment the petition is presented as required by Order XXXIII. Or. I R.10 would therefore be as much applicable in such a suit initiated by the petition as in a suit in which court fee has been paid. It is true that a person who claims to join a petitioner praying for leave to sue in *forma pauperis* must himself be a pauper. But his claim to join (by transposition) as an applicant must be investigated. It is not liable to be rejected on the ground that the claim made by the original applicant is personal to himself. (SHAH J.)

Vijai Pratap Singh v. *Dukh Haran Nath Singh*, 1962 SC 941.

R. 5(d)—doubtful question of law—duty of Court.

Under the rule the court has merely to satisfy itself that the allegations made in the petition, if accepted as true, would entitle the petitioner to the relief he claims. If, accepting those allegations as true, no case is made out for granting relief, no cause of action would be shown and the petition must be rejected. But in ascertaining whether the petition shows a cause of action the court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defences which the defendant may raise upon the merits ; nor is the court competent to make an elaborate enquiry into doubtful or complicated questions of law or fact.

(*Ibid.*)

O. XXXIV R. 6—Composite decree—execution.

It may be that in the case of a composite decree an application as contemplated by R. 6 is not necessary. But the decree may provide that the personal decree against the mortgagor can be executed only if and after the decree-holder has exhausted his remedy against the hypotheca and is not able to recover the whole of the decretal amount by that process.

In a suit on an anomalous mortgage a decree was passed directing that for the satisfaction of the decretal amount the mortgaged properties would be charged preliminary and that if the decretal amount was not fully satisfied from them, then the decree-holder would be entitled to proceed against the mortgagor personally.

Held, the mortgagee was not entitled to execute the personal decree without exhausting the remedy against the mortgaged property.

Krishna Prasad v. *Gouri Kumari*, 1962 SC 1464.

O. XL R. 1(2)—whom the court may remove from possession.

Rule 1(2) limits the power of court to remove any person from the possession of property in the case of a person who is not a party to the suit if the plaintiff has not a present right to remove him. But when a person is a party to the suit the court can direct the Receiver to remove him from possession even if the plaintiff has not a present right to remove him. (SUBBA RAO J.)

Hiralal Patni v. *Loonkaran Sethiya*, 1962 (1) SCR 868 : 1962 SC 21 : 1962 (2) SCJ 418.

COMMON CARRIER—**what is.**

The question in any particular case whether the carrier was a common carrier or a private carrier has to be decided on the ascertainment of what the carrier publicly professes. This profession may be by public notice or by actual indiscriminate carrying of goods. The profession to carry goods indiscriminately may be limited to particular goods or to particular routes or even as to two or more specified points. The fact that there is no fixed charge for carriage from a particular place cannot be any reason to think that the carrier is not a common carrier in respect of carriage from that place. (DAS GUPTA J.)

River Steam Navigation Co. v. *Shyamsunder Tea Co. Ltd.*, 1962 SC 1276 : 1962 (2) SCR 802 : 1961 (2) SCJ 595.

COMPANY—**Bye-laws—proof.**

It is not necessary that for the proof of the bye-laws of a company the original copy of the bye-laws bearing any mark of approval of the company be produced. They may be proved by other evidence. (RAGHUBAR DAYAL J.)

Ramakrishna Dalmia v. *Delhi Administration*, 1962 SC 1821.

COMPANIES ACT 1913, **Ss. 10 and 12—transfer of undertaking by company.**

An exercise by a company of a power given by its memorandum to sell its undertaking cannot amount to an alteration of the memorandum of the company. It cannot therefore be contended that such an arrangement of transfer cannot be done without following the procedure laid down in S. 12. (SARKAR J.)

Shyamapada Chakrabertty v. *Controller of Insurance*, 1962 SC 1355 : 32 Comp Cas 258.

S. 86-H—agreement to transfer by Directors.

An agreement only to transfer the undertaking of the company by the Directors clearly does not violate S. 86-H for it is merely tentative subject to final approval by the company in general meeting.

(*Ibid.*)

S. 153—present in person—representative of creditor company.

Where in a case governed by the Act of 1913 and not by the 1956 Act no proxy is given by a creditor company in accordance with the rules framed by the High Court in exercise of the power conferred by S. 246, a mere resolution of the Directors of the creditor company authorising a Director or other person to represent the company at the creditors' meeting of the debtor company held under S. 153, cannot make that person "present in person" in law for the creditor company and therefore votes cast by such a person at the meeting will not be valid votes.

1959 Patna 293 Affirmed. (DAS GUPTA J.)

Arjun Prasad v. *Shantilal*, 1962 SC 1192.

S. 153(7)—Appeal from decision of Company Judge—whether lies to Supreme Court.

An appeal from the order of the Company Judge of the Patna High Court lies to the High Court and not to the Supreme Court, for the authority authorised

to hear appeals from appealable decisions of a single Judge of the High Court is the High Court under its Letters Patent.

1959 Patna 293 Affirmed.

(*Ibid.*)

Ss. 271 & 272—foreign creditors of foreign company—rights of.

Foreign creditors of a company incorporated outside India and carrying on business in India can prove their claims in the winding up proceedings of the company as an unregistered company in India.

English law Discussed ; 1952 Mad 136 Affirmed. (RAGHUBAR DAYAL J.)

Rajah of Vizianagaram v. *Official Receiver and Official Liquidator of Vizianagaram Mining Co.*, 1962 (2) SCJ 237 : 1962 SC 500 : 1962 (2) MLJ 85.

COMPANIES ACT, 1956, **Ss. 9 and 645—agreement executed before commencement of the Act—also hit by S. 9.**

See *Madanlal F. Dudhediya* v. *Changdeo Sugar Mills Ltd.*, 1962 SC 1543 : 32 Comp Cas 604.

S. 76 (before amend ment in 1960)—commission whether can be paid out of profits.

A claim for commission out of profits of a company in consideration of subscribing for any shares in the company is hit by S.76(1) and cannot be entertained.

English Law Discussed ; 1958 Bom 491 Affirmed.

(*Ibid.*)

CONSTITUTION OF INDIA—**taxing statute—when may be held to be colourable legislation.**

Though the validity of a taxing statute cannot be challenged merely on the ground that it imposes an unreasonably high burden, if it is shown that the Act, which purports to be a taxing Act, is a colourable exercise of the legislative power of the Legislature, then that would be an independent ground on which the Act can be struck down. But such a challenge can succeed not merely by showing that the tax levied is unreasonably high or excessive but by proving other relevant circumstances which justify the conclusion that the statute is colourable and amounts to a fraud. Such a conclusion can be reached where in passing the Act the Legislature has merely adopted a device and a cloak to confiscate the property of the citizen taxed.

1961 SC 552 Referred to. (GAJENDRAGADKAR J.)

Jagannath Baksh Singh v. *State of U.P.*, 1962 SC 1563.

Art. 11—right to citizenship—can be terminated.

Though the citizens of India are guaranteed the fundamental rights specified in Part III, the status of citizenship on which the existence of or continuance of the said rights rests, is itself not one of the fundamental rights guaranteed to anyone. If a law is properly passed by Parliament affecting the status of citizenship of any citizens in the country, it can be no challenge to the validity of the said law that it affects the fundamental rights of those whose citizenship is thereby terminated.

The chapter on fundamental rights proceeds on the assumption that the person who claims the rights guaranteed under the chapter is a citizen of India. If the basic status of citizenship is validly terminated by a Parliamentary statute such person will have no right to claim the fundamental rights. (GAJENDRAGADKAR J.)

Izhar Ahmad v. *Union of India*, 1962 SC 1052.

Part III—Government servants—whether not entitled to fundamental rights.

The argument that the Constitution excludes Government servants as a class from the protection of the several rights guaranteed by the several Articles in Part III save in those cases where such persons were specifically named such as Articles 15, 16 and 18(3) and (4) cannot be accepted and has to be repelled in view of the terms of Art 33. (AYYANGAR J.)

Kameswar Prasad v. *Union of India*, 1962 SC 1166 : 1962 (2) SCA 240.

Taxing statutes—whether cannot be impugned.

It must now be taken to be settled that the validity of a tax law can be challenged not only on the ground of lack or absence of legislative competence but also on the ground that the impugned legislation violates one or the other of the fundamental rights guaranteed by Part III.

Observations in 1951 SCR 127 and 1955-1 SCR 769 Not Approved. (GAJENDRAGADKAR J.)

Jagannath Baksh Singh v. *State of U.P.*, 1962 SC 1563.

Art. 13—severability—procedural enactment.

In general the invalidity of a procedural provision in an enactment cannot be held to affect the validity of a substantive provision. But it is possible to conceive of cases in which the invalidity of a procedural section or rule might so react on a substantive provision as to render it ineffective. But such cases must be exceptional. (VENKATARAMA IYER J.)

Jialal v. *Delhi Administration*, 1962 SC 1781.

Art. 13(1)—doctrine of eclipse—applies also to statutory rules.

The doctrine of eclipse also applies to statutory rules and hence where a rule, valid as originally framed, becomes bad on a supervening illegality, it will, on the illegality being removed, revive.

Muhammadbhai v. *State of Gujarat*, 1962 SC 1517.

Contravention of fundamental rights—whether can be retrospectively validated.

The contention that where the contravention of fundamental rights is concerned, the Legislature cannot pass a law retrospectively validating actions taken under a law which was void because it contravened fundamental rights [*e.g.*, under Art 31(1)] cannot be accepted, for as pointed out in 1959 Supp (2) SCR 8 the infirmity proceeding from lack of legislative competence as well as the infirmity proceeding from the contravention of fundamental rights lead to the same result and that is that the offending legislation is void and *non est*. That being so, if the legislature can validate actions taken under the former class of void legislation, a position which is not disputed, there is no reason why it cannot exercise its legislative power to validate action taken under the latter class of void legislation.

Case law Discussed. (GAJENDRAGADKAR J.)

(The Supreme Court held that a contravention of the fundamental right guaranteed by Art. 31(1) could be validated by a subsequent retrospective legislation.)

West Ramnad Electricity Distribution Co. Ltd. v. *State of Madras*, 1962 SC 1753.

Reasonable administration of invalid law.

The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is constitutionally invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. (AYYANGAR J.)

Collector of Customs v. *Sampathu Chetty*, 1962 SC 316.

Atr. 14—discrimination—burden of proof.

It is for the person who assails a legislation as discriminatory to establish that it is not based on a valid classification and it is well settled that this burden is all the heavier when the legislation under attack is a taxing statute.
(VENKATARAMA AYYAR J.)

East India Tobacco Co. v. *State of Andhra Pradesh*, 1962 (2) SCA 695 : 1962 SC 1733.

Different rates of compensation for property compulsorily acquired.

There is no reason why when two persons are deprived of their property, one richer than the other, they should be paid compensation at different rates when the property of which they are deprived is of the same kind and differs only in extent. There is no comparison between the slab system of income-tax rates and such different rates of compensation. Hence an Act providing for such different rate of compensation for the same kind of land will be violative of Art. 14.

1951 Patna 91 (SB) Approved. (WANCHOO J.)

Karimbil Kunhikoman v. *State of Kerala*, 1962 SC 723.

Doctrine of equal pay for equal work.

The abstract doctrine of equal pay for equal work has nothing to do with the Article. (DAS GUPTA J.)

Kishori Mohanlal Bakshi v. *Union of India*, 1962 SC 1139.

Foreign Exchange Regulation—special procedure whether discriminatory.

A law prescribing a special procedure for investigation of breaches of regulations relating to foreign exchange which has features and problems peculiarly its own, is not hit by Art. 14 as it is based on a classification which has a just and reasonable relation to the object of the legislation. (VENKATARAMA IYER J.)

Shanti Prasad Jain v. *Director of Enforcement*, 1962 SC 1764.

Geographical basis.

There can be a valid classification based on a geographical differentiation but even then that differentiation must be pertinent to the object of the legislation,

(Where the differentiation came to be made as a result of a situation more than a century ago and conditions had so rapidly changed that it was impossible to sustain any distinction between two geographical divisions, the Supreme Court held that the differentiation was a discrimination repugnant to Art. 14.)
(VENKATARAMA IYER J.)

Jia Lal v. *Delhi Administration*, 1962 SC 1781.

Taxing statute—when may be held violative.

See *Jagannath Baksh Singh* v. *State of U.P.*, 1962 SC 1563.

Art. 16(1)—equal opportunity—what it is.

Equal opportunity does not mean getting the particular post for which a number of persons have been considered. So long as a person along with others had been given his chance, it cannot be said that he had no equal opportunity along with others who may have been selected in preference to him. Nor can the fact that the appointing authority made its choice in a particular way be said to amount to discrimination against the person. (SINHA J.)

High Court of Calcutta v. *A. K. Roy*, 1962 SC 1705.

Persons in different grades of Government service—promotion.

It might very well be that "matters relating to employment or appointment to any office" are wide enough to include the matter of promotion. Hence inequality of opportunity for promotion as between citizens holding different posts in the same grade may be an infringement of Art. 16 but as between citizens holding posts in different grades in Govt. service there can be no question of equality of opportunity. (DAS GUPTA J.)

Kishori Mohanlal Bakshi v. *Union of India*, 1962 SC 1139 : 44 ITR 532.

Ban on re-employment of dismissed Government servant.

Where a temporary Government servant's services are terminated and a ban is placed on his future employment under the Government but no explanation is offered why such a ban was placed and no proceeding had been taken against him giving him an opportunity of showing cause against the proposed imposition of the ban, the arbitrary imposition of such a ban would certainly amount to denial of right guaranteed under Art. 16(1). (SINHA C. J.)

Krishen Chander Nayar v. *Chairman, Central Tractor Organisation*, 1962 SC 602.

Art. 19(2) to (6) and Art. 14—test of reasonableness.

No doubt there are situations when the points regarding the violation of Art. 14 and an objection that a restriction is not reasonable so as to conform to the requirements of Art. 19(2) to (6) may converge and may appear as merely presenting the same question viewed from different angles, e.g. cases when the denial of equality before the law is based on the ground of vesting of arbitrary power in an administrative authority. But where however there is guidance to the administrative authority and the legislation is challenged on the ground that it has outstepped the limits of the Constitution by imposing an unreasonable restraint on the rights guaranteed by Art. 19(1), the scope and content of the enquiry is far removed from the tests of conformity with Art. 14.
(RAJAGOPALA AYYANGAR J.)

Collector of Customs v. *Sampathu Chetty*, 1962 (3) SCR 786 : 1962 SC 316 : 1962 (1) SCJ 68.

Art. 19— Statute excluding jurisdiction of courts—reasonableness.

The wide proposition that every determination affecting liberty, rights or property must always be made by a judicial tribunal and none else does not find support from the decided cases. There may be occasions and situations in which the legislature may, with reason, think that the determination of an issue may be left to an expert executive (like the Reserve Bank of India under S. 38(1) and (3) (iii) of the Banking Companies Act relating to winding up of Banking Companies) rather than the courts without incurring the penalty of having the law declared void. The law thus made is justified on the grounds of expediency arising from the respective opportunities for action.

Of course, the exclusion of courts is not lightly to be inferred or conceded. The reasonableness of such a law in the total circumstances will, if challenged, have to be made to the ultimate satisfaction of the Supreme Court and it is only when the Supreme Court considers that it is reasonable in the individual circumstances that the law will be upheld.

Case law Discussed ; 1953 SCR 1049 Distinguished. (HIDAYATULLAH J.)

Joseph Kuruvilla Vellukunnel v. *Reserve Bank of India*, 32 Comp Cas 514 : 1962 SC 1371 : 1962 KLT 69.

Art. 19(1) (a)—scope of the freedom of the press.

See *Sakal Papers (P) Ltd.* v. *Union of India*, 1962 SC 305.

Art. 19(1) (c)—scope and extent of the right.

It is one thing to interpret each of the freedoms guaranteed by the several Articles in a fair and liberal sense ; it is quite another to read each guaranteed right as involving or including concomitant rights necessary to achieve the object which might be supposed to underlie the grant of each of those rights, for that construction would by a series of everexpanding concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grotesque result.

The theory that a right to form unions guaranteed by Art. 19(1) (c) carries with it a fundamental right in the union so formed to achieve every object for which it was formed with the legal consequence that any legislation not falling within clause (4) which might in any way hamper the fulfilment of those objects should be declared unconstitutional cannot be accepted as correct.

The resulting position may be illustrated thus : If an association were formed for the purpose of carrying on business, the right to form it would be guaranteed by Art. 19(1) (c) subject to any restriction laid under cl. (4). As regards its business activities, however, and the achievement of the objects for which it was brought into existence, its rights would be those guaranteed by sub-clause (g) of cl. (1) subject to any relevant law under cl. (6) ; while the property which the association acquires or possesses would be protected by sub. cl. (f) subject to legislation within the limits laid down by cl. (5) and so on.

(RAJAGOPALA AYYANGAR J.)

All India Bank Employees Association v. *National Industrial Tribunal* (*Bank Disputes*), 1962 SC 171.

Art. 19 (1) (f) & (5)—law of pre-emption—whether a restriction.

Even if a law of pre-emption creates a right which attaches to property, it will still amount to a restriction on the right guaranteed by Art. 19 (1) (f), when it attaches to the property by the law of pre-emption.

1955 (1) SCR 70 Referred to. (WANCHOO J.)

Bhau Ram v. *Baij Nath*, 1962 SC 1476.

Pre-emption based on vicinage—validity.

The main reason which sustained the law of pre-emption based on vicinage in previous times, viz., the prevention of strangers, i.e., persons belonging to different religion, race or caste, from acquiring property in any area which had been populated by a particular fraternity or class of people, can have no force now and the law must be held to impose an unreasonable restriction on the right guaranteed under Art. 19 (1) (f) for it is impossible to see such restrictions as reasonable and in the interests of the general public in the state of society in the present day.

1956 Vindh Prad 9, (1954) 4 Raj 84, 1956 Madh Bh 1 (FB), (1954) Hyd 85 (FB) Approved ; 1960 Punj 196 (FB), (1954) Punj 232 Overruled.

But a right of pre-emption based on cosharership is a reasonable restriction on the right and is in the interests of the general public.

(*Ibid.*)

Art. 19 (1) (f) and (g)—law impairing contractural rights.

Unlike in the United States our Constitution-makers while making provision against *ex post-facto* laws in Art 20(1) and "against titles" in Art 18(1) studiously refrained from including a guarantee regarding the impairment of obligations of contracts. There is therefore no scope for the argument that a law which affects or varies rights under a contract is for that reason constitutionally invalid as an unreasonable restriction on the right either to property or to carry on trade or business. (AYYANGAR J.)

Raghubar Dayal Jai Prakash v. *Union of India*, 1962 SC 263.

Taxing statute.

If a taxing statute makes no specific provision about the machinery to recover the tax and the procedure to make the assessment and leaves it entirely to the executive to devise such machinery as it thinks fit and prescribe such procedure as may appear to it to be fair, an imposition of tax in the circumstances would partake of the character of a purely administrative affair and can in a proper sense be challenged as contravening Art. 19(1)(f). (GAJENDRAGADKAR J.)

Jagannath Baksh Singh v. *State of U.P.*, 1962 SC 1563.

Art. 31(1)—retrospective legislation.

Art. 31(1) does not use the expression "law in force at the time" as in Art. 20(1) ; it merely says "by authority of law;" and so if a subsequent law passed by the Legislature is retrospective in its operation it would satisfy the requirement of Art 31(1).

A notification was issued taking over an electrical undertaking under the provisions of Madras Act XLIII of 1949. Subsequently the Act was declared *ultra vires* and became *non est*. Thereafter the Madras Legislature passed the

Madras Electricity Supply Undertakings (Acquisition) Act, 1954 and provided for its retrospective operation for validating actions taken under the earlier Act. The question was whether the subsequent Act could validate the action taken under the notification under the earlier Act.

Held, it cannot be contended that Art. 31(1) postulates the existence of an antecedent law before a citizen is deprived of his property and as it must be assumed that before the notification was issued the relevant provisions of the (subsequent) Act were in existence, Art. 31(1) had been complied with.

(GAJENDRAGADKAR J.)

West Ramnad Electricity Distribution Co. Ltd. v. *State of Madras*, 1962 SC 1753.

Art 31(1) and (2)—taxing statutes.

So far as Art. 31(1) is concerned if a taxing statute is otherwise valid, then Art. 31(1) is complied with ; Art. 31(2) cannot be invoked in impeaching the validity of a taxing statute. (GAJENDRAGADKAR J.)

Jagannath Baksh Singh v. *State of U.P.*, 1962 SC 1563.

Validation of fee already collected under invalid law.

The Legislature has power to legislate retrospectively even with respect to taxation and fees are also included within the taxing power of the Legislature in the broadest sense and therefore a levy validating fees collected already cannot be held to violate Art 31(1).

Muhammedbhai v. *State of Gujarat*, 1962 SC 1517.

Art. 31A(2) (a)—"estate"—meaning in the existing law.

For the purpose of finding out the meaning of the word "estate" in Art. 31A, the court has to look into the law existing on 26.1.1950. (WANCHOO J.)

Karimbil Kunhikoman v. *State of Kerala*, 1962 SC 723.

"estate"—what is—Pandaravaka verumpattom and puravaka lands.

It is in the light of the background of the history of legislation leading to the Constitution First Amendment Act 1951 that the court has to determine the question as to whether any particular property constitutes an estate or rights in relation to an estate under cl. (2) (a) or (b). In deciding what an estate means in cl.(a) the court must in the first instance construe cl. (a) by itself. In that context it will be unreasonable to read clauses (a) and (b) together.

Treating the expression "estate" as of wide denotation, in every case the court will have to enquire whether there is a local definition of "estate" prevailing in the relevant existing law ; if there is one that would determine the question. If not, the court will have to enquire whether there is a local equivalent and in that connection it would be necessary to consider the character of the given agricultural property and its attributes and then decide whether it can constitute an estate under cl. (2) (a). It is not necessary that there must be an intermediary in an estate before it can be called an "estate" within the meaning of cl. (2) (a), though in many cases of estates such intermediaries do exist.

(Basic concept of "estate" explained ; *Pandaravaka verumpattom* lands and *Puravaka* lands in former Cochin State, *held*, "Estates".) (GAJENDRAGADKAR J.)

Purushothaman Nambudiri v. *State of Kerala*, 1962 (1) SCJ 477 : 1962 SC 694 : 1962 (1) SCA 681 : 1962 KLT 1.

Ryotwari land.

Considering that the Madras Estates Land Act 1908 was in force all over the State of Madras but did not apply to lands held on ryotwari settlement and contained a definition of "estate", it is clear that under the existing law relating to land tenures in that part of the State of Kerala which came to it from the former State of Madras is concerned the word "estate" did not include lands of ryotwari pattadars however valuable might be their rights in the lands as they eventually came to be recognised. (WANCHOO J.)

Karimbil Kunhikoman v. *State of Kerala*, 1962 SC 723.

Art. 32—statutory remedies not exhausted—effect.

Where competent authorities under a statute come to a certain decision and it becomes final because the aggrieved person does not move against the decision in an appropriate court by an appropriate proceeding, the person cannot move the S upereme Court under the Article where no question of infringement of any fundamental right arises. (S. K. DAS J.)

Aniyoth Kunhamina Umma v. *Ministry of Rehabilitation*, 1962 (1) SCR 505 : 1962 SC 1616 : 1961 (2) SCJ 621.

Order of taxing authority—when can be challenged.

An order of assessment made by an authority under a taxing statute, which is *intra vires*, and in the undoubted exercise of its jurisdiction cannot be challenged in a petition under Art. 32 on the sole ground that it is passed on a misconstruction of a provision of the Act or of a notification issued thereunder.

1957 SC 790 Dissented from.

The proper remedy for correcting an error in such an order is to proceed by way of appeal or if the error is apparent on the face of the record then by an application under Art. 226 of the Constitution. (S. K. DAS J.)

Ujjambai v. *State of U.P.*, 1962 SC 1621.

The question of enforcing a fundamental right will arise if a tax is assessed under a law which is (a) void under Art. 13 or (b) is *ultra vires* the Constitution, or (c) where it is subordinate legislation, it is *ultra vires* the law under which it is made or inconsistent with any other law in force. (*per* MUDHOKLAR J.)

(*Ibid.*)

Res judicata.

Certificate granted by the High Court to appeal to Supreme Court cancelled for failure to deposit security for printing charges—petition under Art. 32 to Supreme Court challenging the validity of the proceedings—barred by *Res judicata*.

See *Jagannath Baksh Singh* v. *State of U.P.*, 1962 SC 1563 : 1962 (2) SCA 679 : 1962 ALJ 799.

Counter affidavits—duty of Government.

Necessity to be circumspect on the part of those charged with the duty and responsibility of drawing up affidavits in answer to applications under Art. 32 before the Supreme Court emphasized and the careless and irresponsible way in which the counter-affidavit had been drawn up in the instant case criticised.

See *Krishen Chander Nayar* v. *Chairman, Central Tractor Organisation*, 1962 (3) SCR 187 : 1962 (1) SCJ 715 : 1962 SC 602.

Art. 133(1) (a)—substantial question of law—what is.

The proper test for determining whether a question of law raised in a case is substantial will be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by the Supreme Court or the Privy Council or the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or the plea raised is palpably absurd, the question will not be a substantial question of law.

54 Ind. App. 126 Ref. to.

Where the question was the construction of a managing agency agreement which was a question of law, neither simple nor free from doubt, and upon the success or the failure of the contention of the parties they stood to succeed or fail with respect to their claim for a large sum,

Held, the appeal involved a substantial question of law. (MUDHOLKAR J.)

Chunilal V. Mehta v. *Century Spinning and Manufacturing Co. Ltd.*, 1962 SC 1314.

Art. 136—alternative remedies not exhausted by appellant—discretion of Supreme Court.

In spite of the wide amplitude of the jurisdiction of the Supreme Court to entertain appeals by special leave, the court has imposed certain limitations on its own powers for very good reasons and has refused ordinarily to entertain such appeals when the litigant has not availed himself of the ordinary remedies available to him at law.

(In the instant case, the Supreme Court, following its earlier decisions in 1961 SC 1708 and 1962 SC 1323 and distinguishing 1959 SCR 551 and 1962-2 SCR 367, dismissed as "incompetent" an appeal, entertained by special leave, from an order of assessment made by the Commercial Tax Officer, where there were no special circumstances in the case.) (SINHA C. J.)

Ram Saran Das v. *Commercial Tax Officer, Calcutta*, 1962 (2) SCJ 210 : 1962 SC 1326 : 13 STC 6.

Appeals against orders of the Income-tax Appellate Tribunal.

Jurisdiction of the Supreme Court under Art. 136—when may be invoked.

See *Kanhaiyalal Lohia* v. *Commissioner of Income-tax, West Bengal*, 1962 SC 1323.

Art. 196(3)—prorogation—effect on pending Bill.

Unlike in England prorogation does not wipe out the pending business. (GAJENDRAGADKAR J.)

Purushothaman Nambudiri v. *State of Kerala*, 1962 SC 694.

Art. 196(4)—scope.

Clause (4) deals with a case of a Bill which has originated in the Legislative Council of a State and has yet to reach the Legislative Assembly.

(*Ibid.*)

Art. 196(5)—Bill pending assent—dissolution of Assembly—effect.

The effect of cl. (5) is to provide for all cases where the principle of lapse on dissolution should apply. Therefore a Bill pending assent of the Governor or the President is outside cl. (5) and cannot be said to lapse on the dissolution of the Assembly. The scheme of Articles 200 and 201 also supports this conclusion.

(*Ibid.*)

Art. 226—who may apply.

No doubt the Article does not in terms describe the classes of persons entitled to apply thereunder ; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right. Also that right shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like Habeas Corpus or Quo Warranto this rule may have to be relaxed or modified.

1950 SCR 869 Applied.

Held, where a person's personal right to manage a company and to receive remuneration therefor is infringed by a statute, he will have the *locus standi* to file a petition under Art. 226.

1961 Cal. 267 Not Approved. (SUBBA RAO J.)

Calcutta Gas Company v. *State of W. Bengal*, 1962 (2) SCA 147 : 1963 (1) SCJ 106 : 1962 SC 1044.

Mandamus—when can issue.

In order that mandamus may issue to compel the respondent to do something it must be shown that the statute imposes a legal duty and the petitioner has a legal right under the statute to enforce its performance. (KAPUR J.)

Dr. Rai Shivendra Bahadur v. *Governing Body of Nalanda College*, 1962 SC 1210 : 1962 (2) SCJ 208.

Writ of *Certiorari*—when granted.

Certiorari may and is generally granted when a court has acted without or in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject matter of the proceeding or from the absence of some preliminary proceeding or the court itself may not be legally constituted or may suffer from certain disability by reason of extraneous circumstances ; when the jurisdiction of the court depends upon the existence of some collateral fact it is well settled that the court cannot by a wrong decision of the fact give it jurisdiction which it would not otherwise possess. (MUKHERJEA J.)

T. C. Basappa v. *T. Nagappa*, 1955 SCR 250 : 1954 SC 440 : 1954 SCJ 695 : 1954 SCA 620 : 67 LW 613 : (1954) Mys 235.

Statutory Tribunal—when acts judicially—considerations.

A statute is not likely to provide in so many words that the authority acting under it is required to act judicially ; that can only be inferred from the express provisions of the statute in the first instance in each case and no one circumstance alone will be determinative of the question whether the authority set up by the statute has the duty to act judicially or not. The inference will depend upon the express provisions of the statute read along with the nature of the rights affected, the manner of the disposal provided, the objective criterion if any to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute. A duty to act judicially may arise in widely different circumstances which it will be impossible and indeed inadvisable to attempt to define exhaustively.

1952—2 QB 413 Referred to.

Held, the Examinations Committee exercising powers under R. 1(1) of Chapter VI of the Regulations framed under S. 15 of the U.P. Intermediate Education Act, 1921 and debarring a candidate from its examination for using unfair means, is acting judicially and therefore where action is taken by it without giving the candidate an opportunity of presenting his case, the order passed by it will be void.

1952 Cal 594 and 1953 Cal 212 Approved ; View of the High Court in 1956 All 539 Not Approved but the decision Affirmed. (WANCHOO J.)

Board of High School and Intermediate Education, U.P. v. *Ghanshyamdas Gupta*, 1962 SC 1110.

Interlocutory relief—granting of.

Petition challenging vires of Jagir Abolition Act—claim for apportionment of compensation by son of petitioner—whether can be adjudicated—stay of payment of compensation amount—whether can be ordered.

See *Pramod Chandra Deb* v. *State of Orissa*, 1962 (1) SCJ 1 : 1962 SC 1288.

Order for payment of money.

In a petition under Art. 226 an order for payment of money may sometimes be made against the State or an officer of the State to enforce a statutory obligation though the High Court normally does not entertain a petition under Art. 226 to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimant and leaves it to the aggrieved party to agitate the question in a civil suit filed for the purpose. (SHAH J.)

Burmah Construction Company v. *State of Orissa*, 1962 (2) SCJ 148 : 1962 SC 1320 : 12 STC 816.

Writs against Union Government.

Grant of mining lease as directed by the Union Government—writ cannot be issued.

See *Shriram Jhunjhunwala* v. *State of Bombay*, 1962 (2) SCR 733 : 1962 SC 670.

Where on a rejection by the State Government of an application for the grant of a mining lease under the Mineral Concession Rules, 1949, the aggrieved person applies to the Central Government in review and the review petition is also

dismissed, the order of the Central Government in effect is one of rejection of the application for the grant of the mining lease and is not amenable to the jurisdiction of the High Court (of Orissa) in view of the fact that the Central Government is not located within the territories subject to its jurisdiction.

1958 SCR 595 Distinguished ; (1960) Cuttack 685 Affirmed.

(WANCHOO J.)

Madan Gopal Rungta v. *Secretary to the Government of Orissa*, 1962 SC 1513.

Judgment under—whether can be nullified by legislative enactment.

It would be erroneous to equate the judgment of the High Court under the Article with the Article itself and to confer upon it all the attributes of the said constitutional provision. It cannot therefore be contended that just as a provision in the Constitution like the one in Art. 226 cannot be amended by the Governor of a State by issuing an Ordinance, so a judgment under Art. 226 cannot be touched by the Governor in his Ordinance making power. (GAJENDRAGADKAR J.)

State of Orissa v. *B. K. Bose*, 1962 SC 945.

Applicability of Or. II R. 2 C. P. C.

See *Debendra Pratap Narain Sharma* v. *State of U.P.*, 1962 SC 1334.

Art. 252 (1) & (2), Sch. VII List 2 entries 34 and 62—Mysore Lotteries Control and Tax (Amendment) Act., 1957—validity.

By passing the resolution under Art. 352(1) to enable Parliament to enact the Prize Competitions Act, 1955 to control and regulate betting and gambling which are subjects falling under entry 34 of the State List, the Mysore legislature had not surrendered to Parliament the power to tax betting and gambling which falls within entry 62 and therefore the Mysore Amending Act of 1957 cannot be attacked as violating Art. 252(2) or as a piece of colourable legislation. Nor can it be contended that the Mysore Act 27 of 1951 as amended by the 1957 Act is repugnant to the Central Act of 1955 and is therefore void under Art. 254(1).

(KAPUR J.)

R. M. D. C. Private Ltd. v. *State of Mysore*, 1962 SC 594 : 1962 (3) SCR 230 : 1962 (2) SCJ 620 : 1962 (1) SCA 546.

Article 299(1)—Contract not in proper form—effect.

It will be disastrous to hold that the hundreds of Government Officers who have daily to enter into a variety of contracts, often of a petty nature cannot contract orally or through correspondence and that every petty contract must be effected by a ponderous legal document couched in a particular form. It may be that the Government will not be bound by the contract in that case but that is a very different thing from saying that the contracts as such are void and of no effect. Where the officer acts on behalf of the Government and his authority to contract in that capacity is not questioned, but the only flaw is that the contract is not in proper form, not being expressed to be made by the President, it only means the principal cannot be sued, but there will be nothing to prevent ratification especially if it is for the benefit of the Government. It is only right that an innocent contracting party should not suffer because of this and if there is no other objection or defect the Government, no doubt, will always accept responsibility. (BOSE J.)

Chatturbhuj Vithaldas Jasani v. *Moreshwar Parasram*, 1954 SCR 817 : 1954 SC 236 : 1954 SCJ 315 : 1954 SCA 373.

Art. 300—liability of State for tort committed by Government servant.

See Tort—vicarious liability, 1962 SC 933.

Part XIII, Arts. 301, 302 & 303.

It is difficult to accept the argument that the restrictions in Part XIII do not apply to taxation laws.

Nor can the argument that Art. 301 must take colour from Art. 303 be accepted as correct. Art. 303 does not delimit the general terms of Art. 301. So far as Parliament is concerned, Art. 303(1) carves out an exception from the relaxation given in favour of Parliament by Art. 302 which is itself in the nature of an exception to the general terms of Art 301. (S. K. DAS J.)

Automobile Transports v. *State of Rajasthan*, 1962 SC 1406.

Art. 301—Compensatory taxes—whether hit.

Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Art. 301 and such measures need not comply with the requirements of the proviso to Art. 304 (b).

(Working test for deciding whether a tax is compensatory or not detailed.)

1961 (1) SCR 809 Ref. to. (S. K. DAS J.)

Automobile Transport v. *State of Rajasthan*, (*ibid*).

Art. 311—punishment—appropriateness—justiciability.

The Civil Services Rules merely prescribe the diverse punishments which may be imposed upon delinquent public servants ; the rules do not provide for specific punishments for different misdemeanours. The rules leave it to the discretion of the punishing authority to select the appropriate punishment having regard to the gravity of the misdemeanour. The power of the President to impose any punishment for any misdemeanour found proved against a delinquent public servant is unrestricted. The Constitution merely guarantees the protection of a reasonable opportunity of showing cause against the action proposed ; it does not guarantee that the punishment shall not be more severe than a prescribed punishment. (SHAH J.)

A. N. D'silva v. *Union of India*, 1962 SC 1130 : 1962 (2) SCJ 126.

Punishment—suggestion by the Enquiry Officer—whether binding.

The question of imposing punishment can only arise after enquiry is made and the report of the Enquiry Officer is received. The latter has merely to appraise the evidence, to record his conclusion and if he thinks it proper to suggest the appropriate punishment. But neither the conclusion on the evidence nor the punishment which the Enquiry Officer may regard as appropriate is binding on the punishing authority.

(*Ibid.*)

Dismissal of temporary servant.

A mere refusal to pay subsistence allowance to a dismissed temporary Government servant during the period when he was under suspension does not indicate that the termination of service was by way of punishment. (SARKAR J.)

Union of India v. *P. K. More*, 1962 SC 630.

Losing places in same cadre— whether reduction in rank.

The expression "rank" has reference to a person's classification and not his particular place in the same cadre in the hierarchy of the service to which he belongs. Hence losing places in the same cadre as a consequence of the order of the superior authority deferring the consideration of the Government servant's selection to a higher post does not amount to reduction in rank and the provisions of Art. 311(2) are not attracted to such a case. (SINHA C. J.)

High Court, Calcutta v. *A. K. Roy*, 1962 SC 1705.

Reversion to substantive rank from officiating rank.

See Govt. of India Act 1935, S. 240(3)—1962 SC 8.

Reversion of probationer—when amounts to punishment.

A probationer cannot automatically acquire the status of a permanent member of a service unless of course the rules under which he is appointed expressly provide for such a result.

1957 Punj 191 Approved.

The very fact that he is a probationer implies that he has to prove his worth, his suitability for the higher post in which he is officiating. If his work is not found to be satisfactory he will be liable to be reverted to his original post even without assigning any reason. Even so, a probationer cannot, as pointed out in *Dhingra's case* (1958 SCR 828), be punished for misconduct without complying with the requirements of Art. 311(2).

Where the sequence of events shows that the reversion was not in the ordinary course and that the action of the Government was *malafide*, the reversion will be by way of punishment and where the provisions of Art. 311(2) are not complied with, the order of reversion will be illegal and liable to be set aside.

1957 Punj 191 Reversed. (MUDHOLKAR J.)

Sukhbans Singh v. *State of Punjab*, 1962 SC 1711 : 1962 ALJ 883.

Suspension from service.

The Article is not concerned with suspension from service. (SARKAR J.)

Union of India v. *P. K. More*, 1962 SC 630.

Procedure—first enquiry quashed as illegal—second enquiry into the same charge—legality.

It cannot be contended that after an order passed in an enquiry against a public servant imposing a penalty, is quashed by a civil court no proceeding can be commenced against him by the State even if in the proceeding in which the order quashing the enquiry was passed, the merits of the charge against the public servant concerned were never investigated.

Where a suit filed by a public servant challenging the legality of the order of dismissal passed against him was decreed only on the ground that he had not been afforded a reasonable opportunity of showing cause against the charge and the proposed punishment and he was not exonerated in respect of the alleged misconduct, the decision cannot prevent the State from commencing another enquiry

in respect of the same subject matter consistently with the provisions of Arts. 310 and 311.

(1957) Raj. 1029, 1955 Assam 240, (1957) Punj. 1833 Distinguished.
(SHAH J.)

Devendra Pratap Narayan Sharma v. *State of U. P.*, 1962 ALJ 437 : 1962 SC 1334 : (1962) 1 All 636.

Three opportunities—whether can be claimed at both stages.

The contention that at both stages namely, first before the Enquiry officer and secondly before the authority competent to impose punishment, the public servant concerned should be afforded the three opportunities set out in the decision in *Khemchand's case*, 1958 SCR 1080, is devoid of force. (SHAH J.)

U. R. Bhatt v. *Union of India*, 1962 SC 1344.

Public servant refusing to take part—procedure.

The Enquiry Officer is not bound by the strict rules of the law of evidence and when the public servant refuses to take part in the proceedings and fails to remain present at the enquiry it is open to the Enquiry Officer to proceed on the materials placed before him.

Where the public servant declined to take part in the proceedings and the statements previously made by the witnesses for the State were taken into consideration by the Enquiry Officer in making his report,

Held, the enquiry cannot be challenged either on the ground of unfairness or incompleteness or on the ground that the witnesses should have been examined *viva voce*.

(*Ibid.*)

Jurisdiction of Civil Court.

It is not within the competence of the Civil Court to sit in judgment over the decision of the authority who is competent by law to dismiss a public servant provided he had been afforded a reasonable opportunity to defend himself consistently with the substance of the constitutional guarantee.

(*Ibid.*)

Wrongful dismissal—deprivation of salary—Rule 54 of the U. P. Fundamental Rules.

Rule 54 of the Fundamental Rules framed by the State of Uttar Pradesh under the authority conferred under Art. 309 has no application to a case where the dismissal of a public servant is declared invalid by a civil court and he is subsequently reinstated. The effect of the decree is that he is never to be deemed to have been lawfully dismissed and the order of reinstatement is superfluous. In such a contingency it is not open to the authorities to deprive the public servant of the remuneration which he would have earned had he been permitted to work.
(SHAH J.)

Devendra Pratap Narayan Sharma v. *State of U. P.*, 1962 SC 1334 : 1962 ALJ 437 ; 1962 (1) All 636 : 1962 (2) SCJ 282.

Illegal reduction in rank—claim for difference in pay.

Right of a Government servant who has been wrongfully reduced in rank to claim the difference between the pay and allowance actually drawn and those to which he would have been entitled but for the wrongful order.

See *Madhav L. Vaikunthe* v. *State of Mysore*, 1962 (1) SCR 886 : 1962 SC 8 : 1962 (1) SCJ 134.

Art. 320(3)—Union Public Service Commission—whether can sit in appeal over the Enquiry Officer.

See *A. N. D'silva* v. *Union of India*, 1962 SC 1130.

Art. 329(b)—whether affects powers of the Supreme Court under Art. 136.

The *non-obstante* clause in Art. 329(b) only debars a court from entertaining a suit or other proceeding calling in question an election. It is the Election Tribunal alone that can decide such disputes and the proceeding has to be initiated by an election petition and in such manner as may be provided by a statute. But once that Tribunal has made any determination or adjudication on the matter, the powers of the Supreme Court to interfere by way of special leave can always be exercised. (MUKHERJEA J.)

Durga Shankar Mehta v. *Raghuraj Singh*, 1955 SCR 267 : 1954 SC 520 : 1954 SCJ 723 : 1955 SCA 501 : 1954 (2) MLJ 385.

Sch. VII, entries in the Lists—construction.

It is a well settled rule of construction that every attempt should be made to harmonise the apparently conflicting entries not only of different lists but also of the same list and to reject that construction which will rob one of the entries of its entire content and make it nugatory. (SUBBA RAO J.)

Calcutta Gas Company v. *State of West Bengal*, 1962 SC 1044.

List II Entries 25 & 24, List I Entries 7 and 52.

There is an apparent conflict between the two entries 24 and 25 and they overlap each other and therefore the doctrine of harmonious construction should be invoked. Thus the word 'industry' in Entry 24 must be interpreted as excluding gas and gas works. In this view gas and gas works are within the exclusive field allotted to the States. Similarly the expression 'industry' in entries 7 and 52 of List I bears the same meaning as that in entry 24 of List II.

Held, the Oriental Gas Company Act (West Bengal Act XV of 1960) was within the legislative competence of the State Legislature and was unaffected by the Industries (Development and Regulation) Act, 1951 (Central Act) which was void in so far as it purported to affect the gas industry.

1961 Cal 267 Affirmed.

(*Ibid.*)

List II, Entry 49—lands—includes agricultural land.

The word 'lands' in entry 49 is wide enough to include all lands and it cannot be contended that it does not include agricultural lands. (GAJENDRAGADKAR J.)

Jagannath Baksh Singh v. *State of U. P.*, 1962 SC 1563.

CONTEMPT OF COURT—**disobedience of orders of court—honest belief—consideration.**

A wrong but honest belief on the part of an official that he is not bound to act as per prohibitory order said to have been made by a court in the absence of an official communication from the court affords no defence to a charge of contempt of court but is a consideration relevant to the sentence.

1959 Punj 205 Affirmed. (S. K. Das J.)

Hoshiar Singh v. *Gurbachan Singh*, 1962 SC 1089.

Prohibitory order—official communication—unnecessary.

In the case of a prohibitory order, unlike in the case of mandatory orders and orders for the payment of money it is well settled that it is not necessary that the order should have been served upon the party against whom it has been granted in order to justify committal for breach of such order, provided it is proved that the person complained against had notice of the order *aliunde*.

In such a case the person cannot take up the plea that as the order has not been officially communicated to him he is at liberty to ignore it. If he knows that a valid prohibitory order has been made by a superior court, he disobeys that order at his peril. There may be circumstances where officials entrusted with the duty of carrying out a legal order may have valid reasons to doubt the authenticity of the order conveyed to them by interested parties and in those circumstances it may be said that there was no wilful disobedience of the order.

(In the instant case the court held that the Revenue official who refused to obey the probibitory order of the High Court on being informed of the passing of the order by an advocate for the party was guilty of contempt. 1959 Punj 205 Affirmed.)

(*Ibid.*)

Interfering with the course of justice.

There are many ways of obstructing the court and any conduct by which the course of justice is perverted either by a party or a stranger is contempt. Thus the use of threats by letter or otherwise to a party while his suit is pending or abusing a party in letters to persons likely to be witnesses in the cause have been held to be contempts.

Oswald "Contempt of Court" 3rd Edn p. 87 Ref. to.

The question is not whether the action in fact interfered but whether it had a tendency to interfere with the course of justice.

During the pendency of a suit by a Government servant against the Government in respect of his grievance that a certain sum of money was being illegally deducted from his salary, his departmental head drew up disciplinary proceedings against him in accordance with the directions contained in a circular letter issued by the Government that Government servants should exhaust first the normal official channels of redress before proceeding to a court of law.

Held, the action of the departmental head amounted to contempt ; held further, the circumstance that he was merely carrying out the instructions contained in the circular letter did not afford a defence to the charge but was undoubtedly a consideration relevant to the sentence.

1959 Punj. 182 Affirmed. (S. K. Das J.)

Pratap Singh v. *Gurubaksh Singh*, 1962 SC 1172.

Plea of carrying out departmental instructions—no defence—but a relevant consideration to the sentence.

See *Ibid.*

CONTRACT—**assignment of right under—agreement not to assign—need not be express.**

An assignment of a contract might result by transfer either of the rights or of the obligations thereunder. But there is a well recognised distinction between these two classes of assignments. As a rule obligations under a contract cannot be assigned except with the consent of the promisee and when such consent is given it is really a novation resulting in substitution of liabilities. On the other hand, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties.

On the question whether there is an agreement between the parties that the (rights under the) contract will be non-transferable, the absence of a specific clause forbidding transfer is not conclusive. What has to be seen is whether it could be held on a reasonable interpretation of the contract, aided by such considerations as can legitimately be taken into consideration (and it is well settled that in construing a contract it would be legitimate to take into account surrounding circumstances) that the agreement between the parties was that it was not to be transferred. When once a conclusion is reached that such was the understanding of the parties, there is nothing in law which prevents effect from being given to it.

1956 Mad 110 Approved. (VENKATARAMA IYER J.)

Khardah Co. Ltd. v. *Raymon & Co.*, 1962 SC 1810.

Arbitration clause—whether takes away the right.

It is well settled that an arbitration clause does not take away the right of a party to a contract to assign it if it is otherwise assignable.

1946—2 All E.R. 54 Ref. to.

(*Ibid.*)

Contract for sale of goods.

Ordinarily there is nothing personal about a contract for sale of goods for it is of no consequence to the buyer as to who delivers the goods if they are in accordance with the specifications.

(*Ibid.*)

Seller when may assign rights.

There is in law a clear distinction between assignment of rights under a contract by a party who has performed his obligations thereunder and assignment of a claim for compensation which one party has against the other for breach of contract. The latter is a mere claim for damages which cannot be assigned in law, the former is a benefit under an agreement which is capable of assignment. The fact therefore that the right of the seller under a contract for sale of goods to resell the goods in certain contingencies is incapable of assignment does not stand in the way of his assigning his right to receive the price after he has performed his obligations under the contract.

(*Ibid.*)

Consideration—splitting up.

When a contract consists of a number of terms and conditions each condition does not form a separate contract but is an item in the one contract of which it is a part. The consideration for each condition in such a case is the consideration for the contract taken as a whole. It is not split up into several considerations apportioned between each term separately.

Chaturbhuj Vithaldas Jasani v. *Moreshwar Parasuram*, 1954 SCR 817 : 1954 SC 236 : 1954 SCJ 315 : 1954 SCA 373.

Contract of sale through brokers—terms.

According to established commercial usage if there is no variation or disparity in the bought and sold notes issued by the brokers, then they constitute the terms of the contract between the parties for whom the brokers act. But if they show a material variation neither of them nor both of them taken together can be relied upon for the purpose of proving the terms of the contract.

3 Moo. Ind App 448 and 17 QB 103 Ref. to. (GAJENDRAGADKAR J.)

Radhakrishna Sivadutta Rai v. *Tayebali Dawoodbhai*, 1962 SC 538.

CONTRACT ACT, **S. 70—cause of action—basis.**

See *State of West Bengal* v. *B. K. Mondal*, 1962 SC 779.

"lawfully"

It cannot be contended that for the applicability of the section the plaintiff must hold such a relation to the defendant as to be able to claim compensation from him, for that would render S. 70 hardly necessary.

Observations in 11 All 234 Not Approved. (GAJENDRAGADKAR J.)

(*Ibid.*)

Request of defendant.

A request by the defendant is not an element of S. 70 at all though the existence of an invalid request does not make S. 70 inapplicable.

(*Ibid.*)

Government—whether outside the purview.

What the section prevents is unjust enrichment and it applies as much to corporations and Government as to individuals and therefore the very broad argument that the State Government is outside its purview cannot be accepted. The analogy of a minor is inapt because, for one thing, the case of a minor has been specifically provided for by S. 68 and for another, S. 70 cannot, on principle, be invoked against a minor since voluntary acceptance of the benefit of work done which is the foundation of the claim under S. 70, will not be present.

(*Ibid.*)

Invalid contract with Government—compensation for work done.

Where a claim for compensation is made by one person against another under the section, it is not on the basis of any subsisting contract between the parties

but on the basis of the fact that something was done by one party for the other and the work so done has been voluntarily accepted by the other party.

Where in pursuance of a contract with the Government, which not being in compliance with the mandatory provisions of S. 175(3) of the Govt. of India Act, is invalid, a person does some work for the Government, it is open to the Government to refuse to accept the said work and have the benefit of it and to call upon the person to demolish the work. But if the Government accepts the said work and uses it and enjoys its benefits, S. 70 can be invoked and the person will be entitled to compensation for the work done.

11 All 234, 27 All 592, 1955 Cal 626, 53 Bom 309 and 31 Patna 303 impliedly Overruled.

(*Ibid.*)

S. 73—damages—failure to prove market price on the date of breach—effect.

In a case falling under S. 73, it is well settled that, first, as far as possible the party who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a position as if the contract had been performed and secondly it is the duty of the plaintiff to take all reasonable steps to mitigate the loss consequent on the breach and he will be debarred from claiming any part of the damage which is due to his neglect to take such steps.

In a contract for sale of goods, the delivery was to be made through Railway receipt for Calcutta, f.o.r. Kanpur. The seller committed breach and the buyer sued for damages. The plaintiff failed to prove the prevalent rate in Kanpur on the date of breach but had proved the market rate in Calcutta. It was contended on his behalf that as the seller knew that the goods were for resale, the case was one to which the words "which the parties knew when they made the contract to be likely to result from the breach of it" applied and that he was entitled as damages to the difference between the contract rate and the market rate in Calcutta on the date of breach.

Held, (while dismissing the suit) : It could not be inferred from the mere fact that the goods were to be booked for Calcutta, that the seller knew that the goods were for resale in Calcutta alone and that therefore the difference between the Calcutta price and the contract price would be the measure of damages as the likely result from the breach. This was an ordinary case of contract between traders covered by the words "which naturally arose in the usual course of things from such breach."

Held, further, that in the circumstances it was the duty of the plaintiff to buy the goods in Kanpur and rail them to Calcutta and if he suffered any damage thereby he would be entitled to be reimbursed for the loss. Even if he did not actually buy them in the market at Kanpur, he would be entitled to damages on proof of the rate for similar goods at Kanpur on the date of breach if that rate was above the contract rate and as the plaintiff had failed to prove the market rate at Kanpur, he was not entitled to damages.

1957 Madh. Bh. 53 Reversed. (WANCHOO J.)

Murlidhar Chiranjilal v. *Harish Chandra Dwarakadas*, 1962 (1) SCR 653 : 1962 SC 366 : 1962 (1) SCJ 462.

Ss. 74 & 73—specifying the amount of damages—binding nature.

Where the parties have deliberately specified the amount of liquidated damages there can be no presumption that they at the same time, intended to allow the party who has suffered the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of the breach. (MUDHOLKAR J.)

Chunilal V. Mehta v. *Century Spinning and Manufacturing Co. Ltd.*, 1962 SC 1314.

CO-SHARERS—**owners of subdivisions of survey number.**

Where a survey number is subdivided during the currency of a settlement and subdivisions are formed with separate assessment of land revenue on such subdivisions, the holders of the various subdivisions, though they are not strictly co-sharers are very much akin to co-sharers. (WANCHOO J.)

Sukhdeo Narayan Patil v. *Moti Ram*, 1962 SC 1476.

CRIMINAL PROCEDURE CODE, **S. 133—public nuisance.**

Auctioneer bringing articles in carts and parking the carts on the public road outside the building where auctioning takes place—order under S. 133 not justified.

Ram Autar v. *State of U.P.*, 1962 SC 1794.

S. 197—State Government servant serving the Union.

Services of State Government servant lent to the Government of India—Government of India competent to accord sanction.

See *R. R. Chari* v. *State of Uttar Pradesh*, 1962 SC 1573.

CUSTOM—**proof in each case—when necessary.**

It is well settled that where a custom is repeatedly brought to the notice of the courts of a country the courts may hold that custom as introduced into the law without the necessity of proof in each individual case.

45 Ind App 148 Referred to.

Munnalal v. *Raj Kumar*, 1962 SC 1493.

ELECTIONS—**Municipalities—necessity for proper electoral rolls.**

It is of the essence of elections to local bodies that proper electoral rolls should be maintained and for that purpose it is necessary that after the preparation of the rolls opportunity should be given to the parties concerned to scrutinise whether persons enrolled as electors possess the requisite qualifications. Opportunity should also be given for the revision of the electoral roll and for the adjudication of claims to be enrolled therein and entertaining objections to such enrolment. (BHAGWATI J.)

Chief Commissioner of Ajmer v. *Radhey Shyam Dani*, 1957 SC 304.

EMPLOYEES PROVIDENT FUNDS ACT, 1952, **Ss. 1(3) (a) and 2(g)—factory—whether includes composite factory.**

The factory described in the Act need not be a factory which should be exclusively engaged in an industry specified in Schedule I and can be a composite factory. (GAJENDRAGADKAR J.)

Regional Provident Fund Commissioner v. *Shree Krishna Metal Manufacturing Co.*, 1962 SC 1536.

"engaged in any industry"—interpretation.

If a factory is engaged in two industrial activities one of which is its primary, principal or dominant activity and the other is purely a subsidiary, incidental, minor or feeding activity, then it is the primary activity which should determine the character of the factory under S. 1(3) (a).

The broad test which may safely be applied in dealing with this question is : is the factory engaged in the industry specified in Schedule I from a business point of view ? The answer to this question will generally give a satisfactory solution to the problem posed by S. 1(3) (a). Thus whether or not a factory is engaged in any industry in Schedule I would be a question of fact to be determined on the facts and circumstances of each case.

1959 Mad 235 Approved.

(*Ibid.*)

"in which fifty (now twenty) or more persons are employed"—qualify the word factory.

The requirement as to the prescribed number qualifies the word "factories" and does not qualify the word "industry." Therefore the question to ask is : does the factory employ fifty (now twenty) or more persons ? The question is not : does the industry employ 50 (now 20) or more persons ?

(*Ibid.*)

Composite factory employing more than 50 persons and engaged in several industries—whether within the provisions.

Where a factory engaged in several industrial activities, some of them specified in Schedule I and others not, employs more than 50 (now 20) persons in all its sections put together, it will fall within the provisions of the Act, if its dominant activity is one specified in Sch. I.

(*Ibid*).

Where the company had undertaken the fabrication of tin containers only as a feeder activity to its main industrial activity of manufacture of hydrogenated vegetable oil and its bye-products, such as soaps etc, and the containers are not intended to be sold in the market at all, the company will not be a factory within the meaning of S. 1(3) (a).

1957 Bom 149 Affirmed. (GAJENDRAGADKAR J.)

(*Ibid.*)

EVACUEE PROPERTY :—**Admn. of Evacuee Property Act, 1950, S. 28—order whether can be impugned by petition under Art. 32.**

Where neither the provisions of the Act are challenged as unconstitutional nor the order passed by the Custodian General is attacked as null and void as being without jurisdiction, the aggrieved person, where he has not agitated the question in an appropriate proceeding either by way of an appeal with special leave of the Supreme Court or an appropriate proceeding in the (Punjab) High Court having jurisdiction over the Custodian General, cannot be permitted to challenge the correctness on the merits of an order of the Custodian General by a writ petition under Art. 32 because no question of fundamental right of the person concerned arises.

1960—3 SCR 138 Relied on. (S. K. DAS J.)

Aniyoth Kunhamina Umma v. *Ministry of Rehabilitation* 1962 SC 1616.

Displaced Persons (Compensation and Rehabilitation) Act, 1954, S. 12(1)—effect of notification on power of Govt. under Central Act XXXI of 1950.

When a certain property is notified under S. 12(1), all rights, title and interests of the evacuees in the property cease with the result that the property no longer remains evacuee property. Once therefore the property ceases to be evacuee property it cannot be dealt with by the Central Government under the Administration of Evacuee Property Act, (XXXI of 1950) or the rules framed thereunder. The property becomes part of the compensation pool and any variation or cancellation of any lease or allotment thereafter can only be made under S. 19 of the Act.

1961 SC 1320 Rel. on ; (1957) Punj 712 Approved. (WANCHOO J.)

Basant Ram v. *Union of India,* 1962 SC 994.

EVIDENCE ACT, **S. 92—implied term—when can be proved.**

It is true that when a contract has been reduced to writing the court must look only to that writing for ascertaining the terms of the contract between the parties but it does not follow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If on a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had actually agreed to a particular term there is nothing in law which prevents them from setting up that term.

(*Held* that a term prohibiting the assignment of rights under the contract could be implied and deduced on a construction of the contract in the light of the surrounding circumstances).

Khardah Co. Ltd. v. *Raymon & Co.*, 1962 SC 1810.

S. 157—Corroborative evidence—when admissible.

There are only two things which are essential for this section to apply. The first is that a witness should have given testimony with respect to some fact. The second is that he should have made a statement earlier with respect to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact. If these two things are present the former statement can be proved to corroborate the testimony of the witness in court. But it is not necessary that in order to make the corroborative evidence admissible the witness to be corroborated must also say in his evidence that he had made such and such a statement.

1934 Sind 100, 1951 Pepsu 66 Overruled.

Of course if the witness to be corroborated also says in his testimony that he had made the former statement to someone that would add to the weight of the evidence of the person who would give evidence in corroboration, just as if the witness to be corroborated says in his evidence that he had made no former statement to anybody that may make the statement of any witness appearing as corroborating witness as to the former statement of little value. (WANCHOO J.)

Ram Rattan v. *State of Rajasthan,* 1962 (3) SCR 590 : 1962 SC 424 : 1962 (1) SCJ 371.

FATAL ACCIDENTS ACT, 1955, **S. 1—pecuniary loss to the dependants—estimation—burden of proof.**

The actual extent of pecuniary loss to the dependants under S. 1 may depend upon data which cannot be ascertained accurately, but must necessarily be an estimate or even partly a conjecture. Shortly stated the principle that the pecuniary

loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit, and on the other, any pecuniary advantage which from whatever source comes to them by reason of the death, that is the balance of loss and gain to a dependant by the death must be ascertained.

The burden is certainly on the plaintiffs to establish the extent of their loss.

Where the courts below have on relevant material placed before them ascertained a particular amount as damages under this head the said finding cannot, in second appeal, be disturbed except for compelling reasons.

Principles elaborated. (SUBBA RAO J.)

Gobald Motor Service v. *Veluswami*, 1962 SC 1.

Ss. 1 & 2—distinction—same claimant—criteria.

The cause of action under S. 1 and that under S. 2 are different. While under S. 1 damages are recoverable for the benefit of persons mentioned therein, under S. 2 compensation goes to the benefit of the estate. Though in some cases parties entitled to compensation under both the sections may happen to be the same persons, they need not necessarily be so ; persons entitled to benefit under S. 1 may be different from those claiming under S. 2. Under S. 2 damages can be claimed, *inter alia*, for loss of expectation of life. If a person taking benefit under both the sections is the same, he cannot be permitted to recover twice over for the same loss. In awarding damages under both the heads there shall not be duplication of the same claim, that is if any part of the compensation representing loss to the estate goes into the calculation of the personal loss under S. 1, that portion shall be excluded in giving compensation under S. 2 and *vice versa*.

(*Ibid.*)

FORWARD CONTRACT REGULATION ACT, 1952, **Ch. III—validity.**

The provisions in Chapter III of the Act, prescribing the conditions for recognition of an association, do not infringe the freedom guaranteed by sub-clause (c) of Art. 19(1), for there is no right in an association guaranteed by the Constitution to obtain recognition. (AYYANGAR J.)

Raghubur Dayal v. *Union of India*, 1962 SC 263 : 1962 (3) SCR 547 : 1962 (2) SCJ 445.

S. 15—validity.

S. 15 does not infringe Art. 14, 19 (1) (b) or 19 (1) (g) of the Constitution.

(*Ibid.*)

Issue of notification before association is recognised.

The recognition of an association for the purpose of forward trading in a commodity is not an essential prerequisite before a notification under S. 15 can be issued, nor can it be contended that such an issue of a notification is an unreasonable restriction on the right of a person to carry on trade or business.

(*Ibid.*)

S. 16—Validity.

S. 16 which vests in the Government a power to fix the rates cannot be regarded as a piece of excessive delegation nor as offending Art. 14 of the Constitution.

(*Ibid.*).

GENERAL CLAUSES ACT, S. 10—**period prescribed.**

The operation of such a beneficient enactment as S. 10 is not to be cut down on such unsubstantial grounds as the wording of a statute being, "not later than" a specified period instead of within "that specified period".

(VENKATARAMA IYER J.)

Harinder Singh v. *Karnail Singh*, 1957 SC 271.

GOVT. OF INDIA ACT, S. **175(3)—whether mandatory—effect of non-compliance.**

The word "shall" is intended to make the provision obligatory and not directory and therefore a failure to comply with the mandatory provisions of the section makes the contract invalid.

1962 SC 113 followed ; 1954 SCR 817 Distinguished. (GAJENDRAGADKAR J.)

State of West Bengal v. *B. K. Mondal and Sons*, 1962 SC 779.

Invalid contract—compensation for work done.

In many cases the work done or goods delivered for or to the State Government, may be the result of a request made by some officer or other on behalf of the said Government. In such a case the request may be ineffective or invalid for the reason that such officer was not authorised under S. 175(3) or because it was not followed up by a contract executed in the manner prescribed by S. 175(3). In either case the work has been made or the thing delivered without a contract and that brings in S. 70 of the Contract Act. If the requisite conditions prescribed by that section have been satisfied a claim for compensation for the work done or thing delivered can and must be entertained.

(*Ibid.*)

Ss. 240(3) and 266—failure to consult Public Service Commission.

The provision as to consultation with the Public Service Commission (in S. 266 which is similar to Art. 320(3) (c) of the Constitution) is not mandatory and it does not confer any rights on the public servant and therefore a failure to consult or any irregularity in consultation does not afford him a cause of action in a court of law. The content of the protection afforded by S. 240(3) is the same as that afforded by Art 311 of the Constitution.

1958 SCR 533 Rel. on. (SHAH J.)

U. R. Bhatt v. *Union of India*, 1962 SC 1344.

S. 240(3)—Reversion from officiating post.

It is an implied term of an officiating appointment that if the candidate is found unsuitable, he would have to go back. If, therefore, the appropriate authorities find him unsuitable for the higher rank and revert him to the original lower rank the action taken is in accordance with the term on which the officiating post had been given. It cannot therefore be contended that when a person officiating in a post is reverted for unsatisfactory work that reversion amounts to a reduction in rank, where such reversion does not in any way affect the person so far as his condition and prospect of service are concerned.

1958 SCR 828 Ref to ; 1954 Nag 229 Overruled. (SARKAR J.)

State of Bombay v. *F. A. Abraham*, 64 Bom. LR 575 : 1962 (2) SCA 168 : 1962 SC 794.

Reversion to substantive rank.

Mere deprivation of higher emoluments as a consequence of reversion cannot amount to the "evil consequences" referred in *Dhingra's Case*, 1958 SCR 828. But where as a result of an order of reversion from an officiating rank, a Government servant loses his seniority in his substantive post, it is not a simple case of reversion with no evil consequences. Therefore where in such a case the requirements of S. 240(3), corresponding to Art. 311(2) of the Constitution are not fully complied with, the reversion to the substantive rank must be held to be void.
(SINHA C. J.)

Madhav L. Vaikunthe v. *State of Mysore*, 1962 SC 8.

GOVERNMENT OF PART C STATES ACT, (49 of 1951), **S. 17—whether comprises disqualifications mentioned in S. 7 of Act 43 of 1951.**

It cannot be contended that the reference to Art. 102 of the Constitution in S. 17 must be interpreted and limited to Art. 102(1) clauses (a) to (d) and not as including Art. 102(1) (e). The result is, the disqualifications laid down in S. 7 of the Representation of the People Act, (43 of 1951) will be attracted to elections held under the Act. (VENKATARAMA IYER J.)

Satya Dev v. *Padam Dev*, 1954 SC 587 : 1955 SCR 549 : 1954 SCJ 764.

Contract with Central Government.

In view of the definition of the term "Central Government" in S. 3(8) (b) (ii) of the General Clauses Act, a contract with the Chief Commissioner in a Part C State is a contract with the Central Government and would be a disqualification for election to the Legislative Assembly under the section read with Section 7(d) of the Representation of the People Act, 1951. (VENKATARAMA IYER J.)

Satya Dev v. *Padam Dev*, 1955 SCR 561 : 1955 SC 5.

HINDU LAW—**applicability to Jains.**

Jains have generally been regarded as heterodox Hindus and in the absence of special custom they are governed by rules applicable to Hindus.

1921 P.C. 77 Referred to. (SHAH J.)

Munnalal v. *Raj Kumar*, 1962 SC 1493.

Adoption—custom—Jains—adoption by widow without authority.

Among Jains a custom enabling a widow to adopt a son to her husband without express authority has been recognised by judicial decisions and has become a part of the law applicable to Jains in India (except in Madras and the Punjab) by a long and uninterrupted course of acceptance.

74 Ind. App. 254 and 1948 PC 177 Rel. on.

(*Ibid.*)

Mitakshara (Madras School)—consent of *sapindas* when necessary.

The necessity for consent of the husband's *sapindas* for an adoption by the widow arises only where there was no authority from the husband.
(DAS GUPTA J.)

Goswami Shree Vallabhalalji v. *Gowsamini Shree Mahalaxmi Bahuji*, 1962 SC 356 : 1962 (3) SCR 641.

Viruddha sambandha **rule—whether mandatory—wife's sister's daughter's son.**

Ashvalayana's *viruddha sambandha* rule is merely recommendatory and not mandatory and therefore the marriage of a Hindu with his wife's sister's daughter is not invalid in law.

20 Mad 283 Approved ; 11 Mad 49 (FB) Distinguished.

It follows therefore that the adoption of a wife's sister's daughter's son is valid in law.

1956 Patna 340 Affirmed. (DAS GUPTA J.)

Abhiraj Kuer v. *Debendra Singh*, 1962 (3) SCR 627 : 1962 SC 351.

adoption of wife's sister's husband—*Goda Dattak* custom.

Apart from the rule against *viruddha sambandha putra* adoption being only recommendatory, it is difficult to see how the wife's sister's husband can be considered to be *viruddha sambandha putra*. Therefore even if the limitations of the orthodox *Dattak* adoption apply to *Goda* adoption there is no bar to the adoption of the wife's sister's husband. Nor is there a custom barring the adoption of the wife's sister's husband in *Goda Dattak* form. (DAS GUPTA J.)

Goswami Shree Vallabhalalji v. *Goswamini Shree Mahalaxmi Bahuji*, 1962 SC 356 : 1962 (3) SCR 641 : 1962 (1) SCJ 601.

Alienation—widow.

It cannot be laid down as an inflexible proposition of law that whenever there is a usufructuary mortgage the widow cannot sell the property as that would deprive the reversioners of the right to redeem the same. If the income from the property has increased in value, it would be a reasonable step to take to dispose of some of the properties in discharge of the debt and redeem the rest so that the estate can have the benefit of the income. What has to be determined is whether the act is one which can be justified as that of a prudent owner managing his or her own property.

1927 Patna 219 Overruled. (VENKATARAMA IYER J.)

Jaishri Sahu v. *Rajdewan Dubey*, 1962 (2) SCR 558 : 1962 SC 83 : 1962 (1) SCJ 578.

Caste system.

Whatever may have been the origin of Hindu castes and Tribes in ancient times, gradually status came to be based on birth alone.

(GAJENDRAGADKAR J.)

V. V. Giri v. *Suri Dora*, 1959 SC 1318.

Joint family property—property jointly acquired by some members of a joint family.

Coparcenary is a creature of Hindu Law and cannot be created by agreement of parties except in the case of reunion. It is a corporate body or family unit. The law also recognises a branch of the family as a subordinate corporate body. The said family unit, whether the larger one or the subordinate one, can acquire, hold and dispose of family property subject to the limitations laid down by law. But the Hindu Law does not recognise some of the members of a joint

family belonging to different branches or even a single branch as a corporate unit. In such a case if a property is jointly acquired by them it will not be governed by the law of joint family. The rights *inter se* between the members who acquired the said property will be subject to the terms of the agreement whereunder it was acquired. They can only be co-tenants and the property will pass by inheritance and not by survivorship.

20 Suth W. R. 197 Overruled ; 25 Mad 149 Approved ; View of AGARWALA J. in 1954 All 801 Not Approved ; View of GURTU J. in *ibid*. Approved.

(SUBBA RAO J.)

Bhagwan Dayal v. *Reoti Devi*, 1962 SC 287 : 1962 (3) SCR 440 : 1962 (1) SCJ 348.

Partition—reunion—Principles.

To constitute a reunion there must be an intention of the parties to reunite in estate and interest. It is implicit in the concept of a reunion that there shall be an agreement between the parties to reunite in estate with an intention to revert to their former status of members of a joint Hindu family. Such an agreement need not be express but may be implied from the conduct of the parties alleged to have reunited. But the conduct must be of such an incontrovertible character that an agreement of reunion must be necessarily implied therefrom. As the burden is heavy on a party asserting reunion, ambiguous pieces of conduct equally consistent with ordinary joint enjoyment cannot sustain a plea of reunion.

52 Ind App 83 and Mayne's Hindu Law 11th Edn. p. 569 Ref. to.

(*Ibid.*)

Plaintiff's case that there was no partition of the larger joint family and in the alternative that there was a reunion amongst some of the members—absence of particulars necessary—effect.

(See *ibid.*)

HINDU SUCCESSION ACT, 1956, **Ss. 14, 15 and 16—"property"—"possessed" —share declared by preliminary decree in partiton suit—devolution.**

Normally a right declared in an estate by a preliminary decree would be regarded as property and there is nothing in the context in which S. 14 occurs or the phraseology used by the legislature to warrant the view that such a right declared in relation to the estate of a joint family in favour of a widow is not property within the meaning of S. 14.

Where the estate in which she is declared to be entitled to a share is with the family of which she is a member and is in joint enjoyment the estate would be "possessed" by her.

The preliminary decree in a partition suit passed before the Act, declared the share of one K, the widowed paternal grandmother of two brothers. K died after the passing of the Act but before a final decree was made. It was contended on behalf of R, a son of a deceased brother of the two brothers, that under the preliminary decree the interest of K in the estate was merely inchoate, for she had a mere right to be maintained out of the estate and that her right continued to retain that character till actual division was made by a final decree and that on her death before actual division the inchoate interest again reverted to the estate out of which it was carved.

Held (negativing the contention) : The rule laid down by the Judicial Committee in 63 Ind. App. 33 that till actual division of the share declared in her favour by a preliminary decree for partition of the joint family estate, a Hindu wife or mother is not recognised as owner, cannot apply after the enactment of the

Hindu Succession Act and as the share declared by the preliminary decree in favour of K was property possessed by her at the date of her death, such interest, by virtue of sections 15 and 16, devolved upon the two grandsons of K to the exclusion of R, the great grandson. (SHAH J.)

Munnalal v. *Rajkumar*, 1962 SC 1493.

HOUSE RENT CONTROL ACTS :

Delhi and Ajmer Merwara Rent Control Act, 1947, S. 7-A—Constitutional validity.

S. 7A read with Sch. IV to the Act, which prescribes a different procedure with regard to fixation of standard rent for buildings not completed by 24-3-1947 than the one laid down by S. 7 for old buildings, does not violate the fundamental right guaranteed by Art. 14 of the Constitution.

1959 Punj. 381 (FB) Approved ; 1955 Punj. 5 Reversed. (S. K. DAS J.)

Roshanlal Mehra v. *Ishwar Dass*, 1962 SC 646.

S. 7A and para 2 of Schedule IV—nature of the enquiry.

It cannot be contended that under para 2 of Schedule IV there must always be two enquiries : first an enquiry as to whether there are reasons to believe that the rent charged is excessive and secondly on enquiry for fixing the standard rent. It is open to the Rent Controller to accept the reasons stated in the application as *prima facie* good reasons for proceeding to make an enquiry to fix the standard rent and in that enquiry to give the necessary finding that the rent charged by the landlord was excessive.

(*Ibid.*)

Decision of Rent Controller—revision.

If the Rent Controller had wrongly decided the fact whether the building was newly constructed or not, and assumed jurisdiction where he had none, the matter would be open to reconsideration in revision.

(*Ibid.*)

Delhi and Ajmer Rent Control Act, 1952—letting—what constitutes—lease by municipality—formalities.

The Act is not intended to be so comprehensive as to include within its sweep not only tenants, properly so called, but also licensees. It applies only to that species of "letting" by which the relationship of landlord and tenant is created that is to say by which an interest in the property, however limited in duration, is created in pursuance of a contract.

The Municipal Committee, in pursuance of a resolution invited tenders for shops built by it. The highest bidders were allotted various shops on various rents. The allottees occupied the premises and continued to pay the respective amounts. No formal lease deed as required by S. 47 of the Punjab Municipal Act was executed in favour of the allottees. Later they filed applications for fixation of standard rent under the Act. The Committee raised an objection that the applications were not maintainable because there was no relationship of landlord and tenant between the parties.

Held : Since the mandatory provisions of the Municipal Act required a contract under seal, the absence of such a contract could not be cured by mere receipt of rent. The use of the term "rent" did not preclude the landlord from

denying the relationship nor could it be said that the Municipal Committee was estopped by its conduct from challenging the enforceability of the contract since the mandatory provisions of the Muncipal Act had to be strictly followed. Since there was nothing in the Act which was in terms inconsistent with S. 47 of the Municipal Act, S. 38 of the Act was also not attracted. As the circumstances of the case were such that S. 53A of the Transfer of Property Act could not in terms apply, the applications for fixation of standard rent were bound to fail.

(SINHA C. J.)

Dr. H. S. Rikhy v. *New Delhi Municipal Committee*, 1962 (3) SCR 604 : 1962 SC 554 : 1962 (1) SCJ 612.

Hyderabad Atiyat Enquiries Act, 1952, S. 13(2)—Constitutional validity.

It cannot be contended that by denying a person the right to establish his claim to a jagir in the Civil Court, the provision of S. 13(2) offends against Art. 14 of the Constitution ; for even under the circulars issued by the Nizam for holding enquiries into the questions of successions to jagirs the position was clear that jagirs were not heritable and on the death of the jagirdar, on principle and in theory it was always a case of resumption and regrant and the person who claimed to be the successor to a deceased jagirdar had no right to come to a Civil Court for establishing that claim. (GAJENDRAGADKAR J.)

Sikander Jehan Begum v. *A. P. State Government*, 1962 SC 996.

INCOME TAX ACT, 1922, **S. 54—privilege—whether assessee can waive.**

The prohibition imposed by S. 54 against the Court from requiring the authorities to produce before it any return, accounts etc., is absolute : its operation is not obliterated by any waiver by the assessee in whose assessment the evidence is tendered, document produced or record prepared. It cannot be contended that as the section is enacted only for the protection of the assessee, the prohibition contained therein will be inoperative if the assessee waives the privilege enacted for his protection.

1946 Nag 377 and 1940 Mad 768 (FB) Distinguished. (SHAH J.)

Charu Chandra Kundu v. *Gurupada Ghosh*, 43 ITR 83 : 1962 SC 1119 : 1961 (2) SCJ 537.

Prohibition—whether extends to statements of third parties.

The prohibition contained in S. 54 applies not only to documents produced by the assessee but also to statements made by third parties and contained in the record of assessment proceedings.

43 ITR 83 Referred to. (SUBBA RAO J.)

Commissioner of Income-tax, Bombay v. *L. Narayandas*, 1962 SC 1121.

Whether excludes criminal process.

The unconditional prohibition in S. 54 does not exclude from its operation any criminal process and therefore, a Criminal Court acting under S. 94 Criminal Procedure Code cannot direct the production of the documents. The reference in the *non-obstante* clause in S. 54 only to the Evidence Act and not to the Criminal Procedure Code cannot restrict the embargo placed upon the Court by S. 54.

(*Ibid.*)

INSURANCE ACT, **Ss. 35, 36 and 117—order sanctioning transfer of business—validity.**

An order made under S.36 sanctioning the transfer of its life insurance business by one insurance company to another cannot be questioned on the ground that the transfer is a virtual winding up and can be effected only under the provisions of the Companies Act, for S. 36 which has to be read with S. 35 overrides the provisions of the Companies Act.

1908 (1) Ch. 743 Distinguished.

Nor can the order be challenged on the ground that the reduction of the share capital can be effected only as provided in S. 55 *et seq*. of the Companies Act, because the disappearance of the assets of the company, for whatever reasons, does not cause a reduction of the share capital.

If sections 36 and 44 are read together as they must be, it is not possible to take the view that the transfer cannot be sanctioned under S. 36 if the result of that is to denude the transferor company of all its assets out of which an agent can be paid his commission.

Where the transfer is sanctioned with the assent of the share-holders of the two companies concerned, after the policy-holders of the transferor company are heard, no question of discrimination based on Article 14 of the Constitution will arise. (SARKAR J.)

Shyampada Chakrabertty v. *Controller of Insurance*, 1962 SC 1355.

S. 35(3) and S. 36—modification of scheme—validity of sanction.

Where the scheme and the resolution of the share-holders of the transferor company approving it provide for modification thereof later at the suggestion of the Controller and give power to the directors to accept the modifications on behalf of the company and the modifications are pursuant to the terms of the scheme as approved by the share-holders of the transferor company, it cannot be contended that the sanction granted by the Controller is not in terms of the section and hence a nullity. In substance, it will be the scheme of which notice had been given under S. 35 (3) which was sanctioned. In this respect Ss. 35 (3) and 36 are *in pari materia* with S. 53 of the Companies Act, 1913.

Palmer's Company Precedents (16th Edn) p. 844 Referred to ; 61 Cal 913 Approved.

(*Ibid.*)

INTEREST—**equitable relief—whether can be claimed at contract rate.**

It is only in an action instituted by the mortgagee on his mortgage that he will be entitled to interest at the rate and with the rests stipulated in the mortgage down to the date of redemption. But where his rights as a mortgagee are equitably recognised, *e.g.*, while setting aside an alienation in his favour of trust property, he will not be entitled to interest at the contract rate.

Janakirama Iyer v. *Neelakanta Iyer*, 1962 SC 633.

INTERPRETATION OF STATUTES—**anomalies—consideration.**

It is no doubt true that if on its true construction, a statute leads to anomalous results the Courts have no option but to give effect to it and leave it to the Legislature to amend and alter the law. But when on a construction of a statute two views are possible, one which results in an anomaly and the other, not, it is the

Court's duty to adopt the latter and not the former seeking consolation in the thought that the law bristles with anomalies. (VENKATARAMA IYER J.)

Veluswami Thevar v. *Raja Nainar*, 1959 SC 422.

Grammatical construction.

Where the context definitely suggests that a relevant rule of grammar is inapplicable, then the requirement of the context must prevail over the rule of grammar especially where the particular rule is not an invariable rule.
(GAJENDRAGADKAR J.)

Regional Provident Fund Commissioner v. *Sri Krishna Metal Manufacturing Co.*, 1962 SC 1536.

Use of English precedents.

If the words used in an Indian statute are obscure or ambiguous perhaps it may be permissible in interpreting them to examine the background of the law or to derive assistance from English decisions bearing on the point ; but where the words are clear and unambiguous it will be unreasonable to interpret them in the light of the alleged background of the statute and to attempt to see that the interpretation conforms to the said background.

55 Ind App 18 Ref. to. (GAJENDRAGADKAR J.)

State of West Bengal v. *B. K. Mondal & Sons*, 1962 SC 779.

Legal maxims—*contemporanea expositio est optima et fortissima in lege.*

Applicability of the maxim to modern statutes.

See *Senior Electrical Inspector* v. *L. Chopra*, 1962 SC 159 : 1962 (3) SCR 146 : 1962 (1) SCJ 593 : 1962 (1) SCA 585.

Usefulness of illustrations.

See *Jumma Masjid* v. *K. Deviah*, 1962 SC 847.

Statement of Objects and Reasons—whether admissible in ascertaining the legislative intent on the question of severability.

See *Jia Lal* v. *Delhi Administration*, 1962 SC 1781.

Codifying enactments.

In interpreting a statute which codifies a branch of the law it is not permissible to start with the assumption that it was not intended to alter the pre-existing law, nor to add words which are not to be found in the statute or for which authority is not found in the statute. It must be construed according to the natural meaning of the language used. (SHAH J.)

Union of India v. *Mohindra Supply Co.*, 1962 SC 256 : 1962 (3) SCR 497 : 1962 (2) SCJ 179.

Mandatory provision—absence of "shall".

The employment of the term "shall" is not conclusive on the question whether any statutory requirement is mandatory or directory. Similarly the mere absence

of the imperative is not conclusive either. Even in cases where the word "shall" has not been used, the requirement, in the circumstances, may be mandatory.
(AYYANGAR J.)

Collector of Monghyr v. *Keshav Prasad Goenka*, 1962 SC 1695.

Proviso.

It will be against the ordinary canons of construction to treat an exception or proviso as having such a repercussion on the interpretation of the main enactment so as to exclude from it by implication what clearly falls within its express terms.
(S. K. DAS J.)

Automobile Transport (*Rajasthan*) v. *State of Rajasthan*, 1962 SC 1406 : 1962 (2) SCA 35.

Sub-sections.

In dealing with a statutory provision containing several sub-sections, it is necessary that the several sub-sections must be construed as a whole "each portion throwing light, if need be, on the rest." They must be read as parts of an integral whole and as being interdependent ; an attempt should be made to reconcile them if it is reasonably possible to do so, and to avoid repugnancy.
(GAJENDRAGADKAR J.)

Madanlal F. Dudhediya v. *Changdeo Sugar Mills Ltd.*, 1962 SC 1543.

Temporary Enactment.

It is no doubt true that the general rule in regard to temporary enactments is that in the absence of special provision to the contrary proceedings which are being taken against a person under it will *ipso facto* terminate as soon as the statute expires. But it would not be reasonable to hold that this general rule is inflexible and admits of no exceptions. The legal position is that if the right created by the (temporary) statute is of an enduring character and has vested in a person any right, that right is not taken away because the statute by which it was created has expired. If a penalty had been incurred under the statute and has been imposed upon a person the imposition of the penalty would survive the expiration of the statute. Also in some cases the repeal effected by a temporary Act would be permanent and would endure even after its expiry.

Held, the invalidity in the Cuttack Municipal Elections which had been cured by the Validating Ordinance No. I of 1959 did not revive as soon as the Ordinance expired.
(GAJENDRAGADKAR J.)

State of Orissa v. *B. K. Bose*, 1962 SC 945.

LAND ACQUISITION ACT, 1894, **S. 6—acquisition for company—when notification may issue.**

Where land is to be acquired for a company no notification under the section can be issued till the provisions of Part VII of the Act are complied with.
(WANCHOO J.)

R. L. Arora v. *State of Uttar Pradesh*, 1962 SC 764 : 1963 (1) SCJ 33 : 1962 (1) SCA 182 : 32 Comp Cas 268 : 1963 (1) MLJ 23 : 1962 (2) All 181.

Ss. 40 (1) (b) and 41—acquisition for company—"work useful to the public".

On a reading of the two sections it is clear that the fifth term to be provided for in the agreement referred to in S. 41 is directly related to S. 40 (1) (b) and

there can be no doubt that in finding out what is meant by S. 40 (1) (b) we must take into account the fifth term in S. 41 and it is only by reading the two together that it will be possible to find out the intention of the legislature when it provided for acquisition of land for the construction of a work by a company through the machinery of the Act. Thus read it is clear that these provisions require that the work should be directly useful to the public and the agreement shall contain a term as to how the public shall have the right to use the work directly themselves. The fact that the product of the company will be useful to the public is not sufficient to bring the acquisition for a company within the meaning of the relevant words in Ss. 40 and 41. It is only for works that are directly useful to the public and can be directly used by it, e.g., hospital, public reading room, or a library or an educational institution open to the public or such other work as the public may directly use, that land can be acquired for a company under the Act.

1961 (1) SCR 128 Ref. to ; 30 Cal 36 Distinguished ; 1958 All 872 Reversed.

(*Ibid.*)

Ss. 40(1) and 41—satisfaction of Government.

It is for the Court to say what the words in Ss. 40 and 41 mean though it is for the Govt. to decide whether the work is useful to the public. The Government cannot both give meaning to the words and then also say that they are satisfied on the meaning given by them. The satisfaction of the Government must be based on the meaning given to the relevant words by the Court. If it plainly appears that the Govt. are satisfied as a result of giving some other meaning to the words, that satisfaction is of no use.

1958 All 872 Reversed.

(*Ibid.*)

LANDLORD AND TENANT—**denial of relationship—jurisdiction of Revenue Court.**

See under Tenancy laws. Orissa Tenants Protection Act, 1948, S. 7(1).

See *Magiti Sasamal* v. *Pandab Bissoi*, 1962 SC 547.

LAND TENURE—**occupant of ryotwari land—nature of the right of.**

See *Karimbil Kunhikoman* v. *State of Kerala*, 1962 SC 723.

Lease—determination—use of the word "rent".

The word "rent" may be used in the legal sense of recompense paid by the tenant to the landlord for the exclusive possession of premises occupied by him. It may also be used in the generic sense, without importing the legal significance aforesaid, of compensation for use and occupation. The question therefore must depend upon whether or not there is a relationship of landlord and tenant in the sense that there is a transfer of interest by the landlord in favour of the tenant. (SINHA C. J.)

Dr. H. S. Rikhy v. *New Delhi Municipal Committee*, 1962 SC 554.

Permanent tenancy—presumption.

Where land is let out for building purposes without a fixed period, the presumption is that it is intended to create a permanent tenancy. This presumption is not weakened by the fact that the lessee had stipulated with the lessor to be

entitled to give up possession if and when he decided to do so. For that is a right reserved in favour of the lessee and does not confer any corresponding right on the lessor.

Held, on a construction of the lease deed in question, that a permanent tenancy had been created.

(1954) Bom 448 Approved but Distinguished on facts. (SINHA C. J.)

Sivayogeswara Cotton Press v. *M. Panchaksharappa*, 1962 (3) SCR 876 : 1962 SC 413 : 1962 (2) SCJ 85.

LEGAL PRACTITIONER—**misconduct.**

Advocate addressing letters to prospective clients soliciting their briefs—amounts to professional misconduct—deserving suspension for five years.

See *In the matter of A, an advocate of the Supreme Court*, 1962 SC 1337 : 1962 (2) SCJ 153.

Whether carries on an "industry".

A solicitor's firm carrying on the work of an attorney is not an industry within the meaning of section 2(j) of the Industrial Disputes Act, 1947 and therefore a dispute between the firm and its employees cannot be referred for adjudication before an Industrial Truibunal.

1960 (2) SCR 866 Distinguished ; 1958 Cal 460 and 465 Approved ; 1960 Bom 22 Affirmed. (GAJENDRAGADKAR J.)

National Union of Commercial Employees v. *M. R. Meher, Industrial Tribunal*, 1962 (2) SCA 587 : 1962 SC 1080 : 64 Bom LR 693.

LEGAL PRACTITIONERS' ACT 1879, **S. 11—Rule 2 made by the Patna High Court relating to Mukhtars—validity.**

Sections 9 and 11 of the Act must be read together ; it will be wrong to treat the functions, duties and powers of Mukhtars referred to in S. 11 as dissociated from the right to practise given by S. 9. Hence Rule 2 made by the Patna High Court defining the functions of Mukhtars in subordinate civil courts is not repugnant to S. 11

1953 SCR 1 Distinguished. (S. K. DAS J.)

Devata Prasad Singh Choudhuri v. *Hon'ble Chief Justice of the Patna High Court*, 1962 SC 201.

LIMITATION ACT, 1908, **S. 5—explanation for the whole period of limitation whether necessary.**

When an appellant prefers an appeal beyond the period of limitation prescribed, what he has to show is why he did not file an appeal on the last day of limitation prescribed. That may inevitably mean that he will have to show sufficient cause not only for not filing the appeal on the last day but to explain the delay thereafter day by day. It is not necessary for the appellant to show that he acted diligently and to explain his conduct during the whole of the period prescribed.

But even after sufficient cause has been shown a party is not entitled to the condonation of the delay in question as a matter of right. If sufficient cause is not shown, the application has to be dismissed on that ground alone. If sufficient cause is shown then the court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the considera-

tion of all relevant facts such as diligence of the party or his bonafides but it cannot justify an enquiry as to why the party was sitting idle during all the time available to him.

58 Cal 549 Approved ; 1961 Nag 39 and 1919 Patna 503 Overruled.
(GAJENDRAGADKAR J.)

Ramlal v. *Rewa Coal Fields Ltd.*, 1962 SC 361 : 1962 (2) SCR 762.

Arts 30 & 31—compensation for damage to goods delivered—Art 30 applies and not Art 31.

Where the compensation claimed is for the damage to the goods which were eventually delivered, the appropriate article will be Art 30 and not Art 31.

1956 Cal 390 not Approved. (MUDHOLKAR J.)

Jetmull Bhojraj v. *D. H. Railway*, 1962 SC 1879.

Starting point—burden is on the Railway.

The burden is on the Railway administration to establish that the loss or injury occurred more than one year before the institution of the suit.

1960 (2) SCR 75 Relied on.

The consignor wrote a letter to the Railway stating that he had come to know that the consignment had arrived at the destination in a very damaged condition and requesting immediate open delivery which was given two months later. It was contended by the Railway Administration that the consignor knew when he wrote the letter that the consignment appeared to be damaged and that the suit not having been instituted within the time allowed from that date was barred by limitation.

Held (negativing the contention), the statement in the letter must have reference to the outer covering or the package and not to the contents, the Railway which had the custody of the goods could alone have been in a position to say, if at all, as to when the damage was caused and as no attempt had been made by it to show that the damage had in fact occurred more than one year before the suit was instituted, the suit was not barred by time.

1956 Cal 390 Reversed.

(*Ibid.*)

Art 31—starting point—when goods ought to be delivered—on the expiry of reasonable time—effect of correspondence by carrier.

Under the Article, limitation starts on the expiry of the time fixed between the parties and in the absence of any such agreement the limitation starts on the expiry of reasonable time which is to be decided according to the circumstances of the case.

1957 Punj 49 Approved.

The view, therefore, that the time begins from the date when the Railway finally refuses to deliver is not correct.

1952 Nag 77 Not Approved.

This reasonable time, generally speaking, cannot be affected by the subsequent conduct of the parties, e.g. the Railway informing the consignor or the consignee that it is making enquiries to trace the goods.

45 All 43 and 1951 Cal 462 Not Approved.

Nor can there be, generally speaking, any question of estoppel in the matter of the starting point because of any correspondence carried on between the carrier and the person whose goods are carried.

12 Patna 67 Not Approved.

But if the correspondence discloses anything which amounts to an acknowledgment of liability that will undoubtedly give a fresh starting point.

(WANCHOO J.)

Bootamal v. *Union of India*, 1962 SC 1716 : 1962 (2) SCA 669.

Reasonable time—what is.

The reasonable time will depend upon the facts of each case and in the absence of any special circumstances the reasonable time will practically be the same between two stations as would normally or usually or ordinarily be taken for the carriage of the goods from the one station to the other. Where the bulk of the goods have been delivered and only a part has not been delivered, it is easy to see that the reasonable time is that within which the bulk of the goods have been delivered.

1958 Cal 434 and 1955 Pat 182 Ref. to.

(In the instant case where the Railway had informed the consignor that the goods were still lying in the station (in Pakistan) where it was booked (before the Partition of the Country) because of the restrictions imposed by the (Pakistan) Government and asked him to get the necessary permits from that Government, the Supreme Court held that the fact had nothing to do with the question of reasonable time to be taken for the carriage of the goods and that limitation started when the consignor gave the notice under S. 80 C. P. C.)

(*Ibid.*)

Relevancy of correspondence of carrier.

If the correspondence discloses material which might throw light on the question of determining the reasonable time for the carriage of the goods, it may be open to the court to take into account the correspondence. If there is anything in the correspondence which has a bearing on this question and the carrier wants to go back on that, to that extent the carrier may be estopped from denying that. But the correspondence can only be taken into account to determine what would be reasonable time and not to show that because of the subsequent conduct of the carrier the reasonable time got extended by the time taken by the carrier in tracing the goods.

(*Ibid.*)

Art 102—arrears of salary of Government servant.

A suit by a Government servant for arrears of salary is governed by Article 102 and it cannot be said that "salary" is not included in the term "wages".

(SINHA C. J.)

Madhav L. Vaikunthe v. *State of Mysore*, 1962 SC 8.

Art. 109—mesne profits for more than three years.

No doubt normally a successful plaintiff would be entitled to mesne profits for three years and not more. But in certain cases in making equitable adjustments between rival parties the court may award profits for more than three years e.g. where in setting aside an alienation of trust property the court directs that

the alienee should get the amount due to him from the trust with interest, it may direct the alienee to give an account of the profits from the date of his getting possession even if that be more than 3 years before suit.

(GAJENDRAGADKAR J.)

Janakirama Iyer v. *Neelakanta Iyer*, 1962 SC 633.

Art. 149—starting point.

The article does not posit that such a suit should have been maintainable at the instance of a private person. It assumes its maintainability and on that basis refers to the appropriate article for the limited purpose of ascertaining the starting point of limiation. Hence the contention that since a private person cannot file a suit like the one filed by the Government, Art. 149 will not avail the Government, though appears to be plausible, has no merits. (SUBBA RAO J.)

Jall Parsi v. *Union of India*, 1962 SC 1280.

Art 151—Letters Patent appeal in Punjab.

Rule 4 made by the Punjab High Court in exercise of the legislative power conferred upon it under Clause 27 of the Letters Patent is a special law within the meaning of S. 29(2) of the Limitation Act and as such an appeal under the Letters Patent could be filed within 30 days from the date of an order of a single Judge of the Punjab High Court. The argument that clause 37 of the Letters Patent makes the rule subject to a law made by the Governor General in Legislative Council and therefore Art 151 shall prevail over the said Rule 4 has no force because the Limitation Act itself saves the operation of the said rule which is a special law.

1941 Lah 257 Approved ; 1958 Punj 365 Reversed. (SUBBA RAO J.)

Union of India v. *Ram Kanwar*, 1962 SC 247 ; 1962 (3) SCR 813 : 1962 (2) SCJ 670.

Art 158—reference through court—oral intimation by court of filing of award—starting point.

See *Nilkantha S. Ningashetti* v. *Kashinath S. Ningashetti*, 1962 SC 666.

Art 183—Ordinary Original Civil Jurisdiction—order under S. 187, Companies Act, 1913.

There is no difference in the character of the original civil jurisdiction which is conferred upon a High Court by its Letters Patent and the jurisdiction conferred by special Acts. When in exercise of its authority conferred by a special statute, the High Court in an application presented to it as a court of first instance declares liability to pay a debt, the jurisdiction exercised is original and civil and if the exercise of that jurisdiction does not depend upon any preliminary step invoking exercise of discretion of the High Court, the jurisdiction is ordinary.

An order passed by a High Court under S. 187 of the Companies Act, 1913 directing payment of an amount due by a contributory to a company is an order passed in exercise of its ordinary original civil jurisdiction and as such is goverend by Art. 183 and not by Art. 182. The fact that the High Court, by its Letters Patent, was not invested with jurisdiction to entertain civil suits in exercise of its ordinary original civil jurisdiction does not affect this position.

16 Ind. App. 156 Rel. on ; (1958) Mad 685 Approved ; 1951 All 362 Affirmed.

(SHAH J.)

Jyoti Bhushan Gupta v. *The Banaras Bank Ltd.*, 1962 SC 403.

Mesne Profits.

The court cannot award past mesne profits prior to the date mentioned in the plaint, which had never been claimed by the plaintiff.

Sunkavilli Suranna v. *Gobi Sathiraju*, 1962 SC 342.

MORTGAGE—**redemption—vesting of hypotheca in the State—effect.**

See *Sailendra Narayan Bhanj Deo* v. *Jagat Kishore Prasad*, 1962 SC 914.

NEWSPAPER (PRICE AND PAGE) ACT, 1956 **and Daily Newspaper (Price and Page) Order, 1960—Validity.**

S. 3(1) of the Act which is its pivotal provision infringes the rights guaranteed under Art 19(1)(a) of the Constitution and is invalid. The Daily Newspaper (Price and Page) Order, 1960, made thereunder is also unconstitutional.

If S. 3(1) is struck down as bad, nothing remains in the Act itself.

(MUDHOLKAR J.)

Sakal Papers (P) Ltd. v. *Union of India*, 1962 (3) SCR 842 : 1962 SC 305 : 1962 (2) SCJ 400.

ORISSA MUNICIPAL ELECTIONS VALIDATING ORDINANCE I OF 1959—**Validity.**

S. 4 does not contravene Art 14 of the Constitution.
1959 SCR 279 Rel. on.

S. 5(1) is not void as being inconsistent with Art. 254 (2).
1960 Orissa 46 Reversed. (GAJENDRAGADKAR J.)

State of Orissa v. *Bhupendra Kumar Bose*, 1962 SC 945.

OUDH ESTATES ACT, 1869, **Ss. 2 and 12**—*Wakf-alal-aulad*—**applicability.**

Under Mahomedan Law, a *wakf-alal-aulad* (which has become valid after after Act VI of 1913), being a transfer without consideration amounts to a gift of property to God Almighly for certain purposes and is clearly a transfer within the meaning of the term in S. 2. Hence the contention that a *wakf-alal-aulad* is entirely outside the purview of the Act is not valid. It will only be valid if it is within the powers conferred on the taluqdar and is not hit by S. 12.

1957 All 94 Affirmed. (WANCHOO J.)

Mohd. Ismail v. *Sabir Ali*, 1962 SC 1722.

S. 12—vesting of beneficial estate postponed indefinitely—effect—*wakf-alal-aulad.*

The vesting contemplated by the section is absolute vesting (i.e. vesting of both legal and beneficial estates) and such absolute vesting involves that the person in whom the property is vested can deal with it as he likes and also deal with its usufruct as he likes.

A deed of *wakf-alal-aulad* provided that an insignificant portion of the income would be used for certain religious purposes and the rest of the income was to be used for the benefit of the *wakif* and his descendants from generation to generation and it was only when the line of the *wakif* was completely extinct that the whole of the income of the property could be utilised for religious or charitable purposes.

Held, even though the property may vest in God immediately on the creation of the *wakf-alal-aulad* as for generations to come God Almighty would have no beneficial ownership, the vesting was undoubtedly postponed beyond the period allowed and therefore the wakf in this case was hit by S. 12.

1957 All 94 Affirmed.

(*Ibid.*)

S. 18—whether subject to S. 12.

The argument that S. 18 is an independent section fully providing for gifts of a charitable and religious nature cannot be accepted for S. 18 is merely a procedural provision for gifts of the type covered by it. Even if the argument were to be accepted a gift made under S. 18 will still be subject to S. 12 because S. 18 deals with transfers of a particular type under the Act and provides for no exception so far as religious or charitable trusts made under the Act are concerned like S. 18 of the Transfer of Property Act.

1957 All 94 Affirmed.

(*Ibid.*)

PLEADINGS—**construction.**

Whether mofussil pleadings can be construed too strictly—

See *Abdul Khader Shamsuddin* v. *Madhav Prabhakar*, 1962 SC 406.

PRACTICE—SUPREME COURT—**New Plea.**

New plea not raised in courts below raised before the Supreme Court depending for its adjudication on notifications said to have been issued by the Government —not allowed to be raised—

See *Gian Singh* v. *State of Punjab*, 1962 SC 219.

Points not disclosed in statement of case.

Where there are no exceptional circumstances the Supreme Court will not ordinarily allow counsel at the time of hearing an appeal to raise questions not disclosed in the statement of case.

Jall Parsi v. *Union of India*, 1962 SC 1280.

PRECEDENT—**Conflicting Bench decisions—procedure.**

When a Bench of a High Court gives a decision on a question of law, it should in general be followed by other Benches unless they have reasons to differ from it in which case the proper course to adopt would be to refer the question for the decision of a Full Bench.

37 All 604 (P.C.) Referred to. (VENKATARAMA IYER J.)

Jaishri Sahu v. *Raj Dewan Dubey*, 1962 SC 83.

Law declared by High Court—binding on tribunals.

The law declared by the High Court is binding on authorities or tribunals under its superintendence and they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding. (SUBBA RAO J.)

East India Commercial Co. Ltd. v. *Collector of Customs*, 1962 SC 1893.

PRESUMPTIONS—**rules as to conclusive presumptions—whether rule of evidence or substantive law—test.**

In dealing with the question as to whether a given rule prescribing a conclusive presumption is a rule of evidence or not, the court cannot adopt the view that all rules prescribing irrebuttable presumptions are rules of substantive law. The proper approach to adopt will be whether fact A from the proof of which a presumption is required to be drawn about the existence of fact B, is inherently relevant in the matter of proving fact B and has inherently any probative or persuasive value in that behalf or not. If fact A is inherently relevant in proving the existence of fact B, and to any rational mind it would bear a probative or persuasive value in the matter of proving the existence of fact B, then a rule prescribing either a rebuttable presumption or an irrebuttable presumption in that behalf will be a rule of evidence. On the other hand, if fact A is not so relevant or has no such probative value and yet a rule is made prescribing for a rebuttable or irrebuttable presumption in that connection, that rule would be a rule of substantive law and not a rule of evidence.

(In the instant case the Supreme Court held that Rule 3 of the Citizenship Rules 1956 prescribing a conclusive presumption was only a rule of evidence and could not be challenged as being outside the scope of the authority conferred on the Central Government by s. 9(2), Citizenship Act.)

Text Books on Evidence Referred to ; (1931) 76 Law. Ed. 772 Ref. to.

(GAJENDRAGADKAR J.)

Izhar Ahmad v. *Union of India*, 1962 SC 1052 : 1962 (2) Cr. L.J. 215.

PRIVATE INTERNATIONAL LAW—**Rule of reciprocity—applicability to modern decisions.**

The general argument that the principle of reciprocity of validating foreign decrees is gradually finding more and more recognition in modern decisions and therefore the rigour of the rule of Private International Law as to limitation on the competence of courts to try personal actions against non-resident foreigners should be relaxed cannot be accepted.

English Law Discussed. (GAJENDRAGADKAR J.)

Andhra Bank Ltd. v. *Srinivasan*, 1962 SC 232.

Foreign judgment against non-resident legal representatives of deceased defendant—validity.

Where a suit for money is brought in a foreign court against residents over whom the foreign court has jurisdiction there can be no doubt that the suit as brought is perfectly competent and filed before a court of competent jurisdiction. If in such a case one of the defendants dies and his legal representatives who are non-resident foreigners are brought on record in the said suit, there is nothing in the rule of Private International Law (that all personal actions must be filed in the courts of the country where the defendant resides) to suggest that the said jurisdiction automatically comes to an end as soon as one of the defendants dies leaving as his legal representatives persons who are non-resident foreigners. The jurisdiction of the foreign court continues unaffected. In form it is a personal action against the legal representatives but in substance it is an action continued against them as legal representatives.

Observations in 59 Mad 461 and 21 Bom 424 (F.B.) Distinguished.

A decree passed in such a suit against the legal representatives, therefore, will be prefectly valid inrespective of the question whether they have been served with

notice of the suit or whether they have submitted to the jurisdiction of the foreign court.

(*Ibid.*)

PROVINCIAL INSOLVENCY ACT, S.68—**considerations—price too low—whether a ground.**

The power under S. 68 is a judicial power and must be exercised on well recognised principles justifying interference with an act of the Receiver which he is empowered to do under S. 59(a) and the court cannot arbitrarily set aside a sale decided upon by the Receiver. It is true that the court has to look in insolvency proceedings to the interest in the first place of the general body of creditors ; in the second place to the interest of the insolvent ; and lastly to the interest of the intending purchaser in that order. Even so the decision of the Receiver in favour of a sale should not be set aside unless there are good grounds for interfering with the discretion exercised by the Receiver. These grounds may be wider than the grounds envisaged in auction sales in execution proceedings, but they must be judicial grounds on which the court will act. These grounds may be, for example, that there was fraud or collusion between the Receiver and the insolvent or the intending purchaser ; or there were irregularities in the conduct of the sale which might have affected the price fetched. Again even when there was no fraud, collusion or irregularity the price fetched may still be so low as to justify the court to hold that the property should not be sold at that price. These and similar other grounds depending upon particular circumstances of each case may justify interference with a sale by the Official Receiver. (WANCHOO J.)

Srinivasa Naicker v. *Engammal*, 1962 SC 1141.

Duty of insolvency Court.

Before the court can come to the conclusion that the price fetched is low, it has to find out first the price of the properties by some recognised method and secondly the total amount of encumbrances on the properties. If on finding these things it appears that the difference between the two is much larger than the price offered, the court may interfere. But when no such findings are given, the interference by the insolvency court with the Receiver's sale cannot be sustained.

(*Ibid.*)

S. 75—Proviso—jurisdiction of High Court—when arises.

The jurisdiction of the High Court arises only if it is of opinion that the District Judge's order is not according to law. Hence in cases where the Subordinate Judge acting under S. 68 sets aside an act of the Receiver and that order is reviewed by the District Judge, the High Court has to see whether the Subordinate Judge's order is justified on the well recognised grounds justifying interference with an act of the Receiver and whether the District Judge made any mistake in law in reversing that order. If the Subordinate Judge's order is not justified on these grounds and if the District Judge made no mistake in law in interfering with that order, the High Court cannot interfere in revision.

(*Ibid.*)

PUNJAB CIVIL SERVICES (EXECUTIVE BRANCH) RULES, 1930, **Rules 23 and 24—right of probationer.**

On completion of the period of probation, the probationer does not automatically acquire the status of a permanent member of the service but is merely

qualified for substantive permanent appointment and is liable to be reverted to his original post without assigning any reason except where the reversion is by way of punishment when the requirements of Art 311(2) of the Constitution have to be satisfied.

Sukhbans Singh v. *State of Punjab*, 1962 SC 1711.

PUNJAB MUNICIPAL ACT, 1911, **S. 47(3)—provisions mandatory—plea of estoppel.**

The provisions of S. 47(3) are mandatory and are not merely directory. When therefore the statute makes a specific provision that the Committee has to act in a particular manner and no other, a mere plea of estoppel by conduct cannot avail against the Committee. (SINHA C. J.)

Dr. H. S. Rikhy v. *New Delhi Municipal Committee*, 1962 SC 554.

Contract not in proper form—void.

A contract or transfer of property executed otherwise than in accordance with the provisions of the section will be void.

(*Ibid.*)

PUNJAB LAND REVENUE ACT, 1887, **S. 9—Rules framed under—applicability after passing of Adaptation of Indian Laws Order, 1937.**

The conditions of service of civil servants in Punjab having remained unaltered even after the Govt. of India Act 1935 was brought into operation by virtue of the Commencement and Transitory Provisions Order 1936, and the Adaptation of Indian Laws Order 1937 having made express provision saving the Tehsildars' Rules 1932 as well as the authority granted thereunder to the Financial Commissioner, the Financial Commissioner continued to be vested with the power to dismiss Tehsildars from service.

1960 Punj. 168 Affirmed. (SHAH J.)

Gian Singh v. *State of Punjab*, 1962 SC 219 : 1962 (3) SCR 515 : 1962 (1) SCJ 641.

PUNJAB PRE-EMPTION ACT, 1913, **S. 16—Constitutional validity.**

The first, third and fourth grounds in S. 16 do not offend Art 19(1)(f) but the sixth ground is unconstitutional as it offends Art. 19(1)(f) of the Constitution.

(1954) Punj 232 (F.B.) and 1960 Punj 196 (F.B.) Overruled ; 1958 Punj 44 Affirmed. (WANCHOO J.)

Kesar Devi v. *Nanak Singh*. (*Bhau Ram* v. *Baijnath*), 1962 SC 1476.

S. 16 and S. 5—whether offend Art 14.

It cannot be contended that S. 16 offends Art 14 of the Constitution either on the ground that S. 5 exempts certain properties from the application of the Act or on the ground that S. 16 does not apply to agricultural property. So far as agricultural properties are concerned, they form a distinct class by themselves and therefore there can be no question of discrimination on that account, while with regard to the exemption contained in S. 5 the premises exempted thereunder are practically of one class, namely, those to which the public has to resort, and it is

this class which is distinct from the rest of the residential property meant for private residence of individuals which has been exempted.

(*Ibid.*)

RAILWAYS ACT, S. 77—**Notice—must be liberally construed.**

A notice under S. 77, regard being had to the object of the section, must be liberally construed.

A letter reading as follows, was relied on as notice under S. 77 : We confirm our telegram "Part goods not reached. Please reach urgently" and regret we have as yet heard nothing in response thereto nor the part goods have reached destination. Will you therefore please take necessary action to cause the part consignment to reach destination immediately.

It was contended that as no claim for compensation had been made in the notice, S. 77 had not been complied with.

Held, (negativing the contention), such a claim must be deemed to be implied in the letter and the letter was sufficient notice for purposes of S. 77.

1956 Cal. 390 Reversed. (MUDHOLKAR J.)

Jetmull Bhojraj v. *Darjeeling Himalayan Railway Co.*, 1962 SC 1879.

S. 80—burden—when shifts to the delivering Railway.

No doubt it is for the consignor to establish if he wants to sue a railway administration other than the one which booked the consignment, that the damage had occurred on its system but where a consignor receives his consignment in a damaged condition from the delivering railway the burden will shift to the delivering railway to show that the damage had not occurrd on its railway. This burden could be discharged by showing that the consignment was already damaged before it was received by that Railway.

(*Ibid.*)

REQUISITIONED LAND (CONTINUANCE OF POWERS) ACT, 1947, **S. 3 —"may use land in such manner as may be expedient".**

The words "may use or deal with any requisitioned land in such manner as may appear to it to be expedient" were only a repetition of the words in R. 75A(2) of the Defence of India Rules 1939. It cannot be said that under the said Rules a requisition need not have been made for a public purpose because the express provisions of Rule 75A negative this contention.

Where therefore a building which was requisitioned under Rule 75A was not used for any of the purposes for which it was requisitioned for a number of years the building could be derequisitioned even after the passing of the Requisitioning and Acquisition of Immovable Property Act, 1952.

1958 Punj. 365 Affirmed. (SUBBA RAO J.)

Union of India v. *Ram Kanwar*, 1962 SC 247.

RES JUDICATA—**two appeals from same judgment—Election matter.**

See *Badri Narayan Singh* v. *Kamdeo Prasad Singh*, 1962 SC 338 : 1962(3) SCR 759 : 1962(1) SCJ 63 (distinguishing 1953 SC 419).

REWA STATE PRE-EMPTION ACT, 1946, **S. 10(1) and (2) and Proviso—validity.**

S. 10(2) which creates a right of pre-emption based on the ground of vicinage offends Art 19(1) (f) of the Constitution. The matter of consolidation of holdings

might have had some bearing if the provision was applicable to agricultural lands only. It applies to urban lands as well as house property where no question of consolidation of holdings arises and as there is no way of severing the application of the law so far as it relates to agricultural holdings from its application to urban or house property, the entire provision as to vicinage must fall even if something could be said in its favour with respect to agricultural holdings on the ground of consolidation. Therefore the second clause of S. 10(2) must be struck down.

So far as the proviso is concerned, it will survive for the purposes of the first clause only which is not invalid. (WANCHOO J.)

Bhau Ram v. *Baij Nath*, 1962 SC 1476.

SALE OF GOODS—**endorsement of delivery order by buyer—effect.**

No doubt without an appropriation of goods to an agreement for sale there cannot be a completed contract in which the property in the goods passes to the buyer and unless the property in the goods passes there is no sale.

But where the buyer without taking delivery himself endorses the delivery order for consideration and enables the endorsee to take delivery and that endorsee (and it makes no difference to the principle if a further endorsee from him does so) takes delivery of the goods, the goods become appropriated to the contract and the property in goods passes to the buyer and in such a case there will be a second completed sale effected by the buyer to his endorsee. It cannot be contended that the endorsement of the delivery order is not sale of goods but is merely a transfer of the delivery order as some paper.

1961 SC 1065 Rel. on ; 1959 Andh. Pra. 21 Reversed ; 1954(2) All E. R. 694 Ref. to. (AYYANGAR J.)

State of Andhra Pradesh v. *Kolla Sree Ramamurthy*, 1962 SC 1585 : 13 STC 522.

Foreign buyer—property when passes in India.

Where the course of dealing between the Indian seller and the foreign buyer was as follows :—After the contract was finalised through correspondence the foreign buyer opened with his Banker an irrevocable letter of credit in favour of the seller, intimation of such opening was given to the seller through a Bank in India, the seller shipped the goods, obtained bill of lading in his own name and lodged it endorsed in blank with his own Banker together with the invoice and Bill of Exchange and discounted the Bill through his own Bank and the shipping documents were then forwarded to the Foreign Bank who on presentation paid the amount whereupon the Bill of lading was delivered by the Foreign Bank to the buyer and the goods were unloaded.

Held, the property in the goods did not pass to the buyer within the territory of India.

1956 Mad 695 Reversed. (SHAH J.)

Ramalingam & Co. v. *State of Madras*, 1962 SC 1148 : 13 STC 335.

SEA CUSTOMS ACT, 1878, **S. 178-A.**

The section is not invalid as being an unreasonable restriction on the fundamental rights guaranteed by Art 19(1)(f) and (g).

1959 Mad 142 Reversed ; Decision of K. T. Desai J. in 62 Bom. L. R. 1043 Overruled ; 1960 Punj. 664 and (1959) Bom. 1771 Affirmed.

(RAJAGOPALA IYENGAR J.)

Collector of Customs v. *Sampathu Chetty*, 1962 SC 316.

SHEBAIT—**whether mere *archaka* (*pujari*).**

See 1962 SC 1329.

SOCIETIES REGISTRATION ACT, 1860—**registered society—whether Corporation.**

See *Board of Trustees, Tibia College, Delhi* v. *State of Delhi*, 1962 SC 458.

SPECIFIC PERFORMANCE—**agreement to reconvey—formal tender of consideration money—offer by solicitor.**

Upon an agreement to convey certain property the vendor's solicitor called upon the vendee to reconvey the property but the latter replied denying that there was any concluded agreement. The vendor sued for specific performance and it was contended by the defendant (1) that the plaintiff did not tender the price and (2) that the offer made by a solicitor was not a proper offer in law.

Held, (negativing the contentions) :

(1) In cases of this kind no question of formal tender of the price arises and the question to be decided is not whether any money was within the power of the plaintiff but whether the defendant unequivocally refused to carry out his part of the contract and intimated that money will be refused if tendered ;

(2) It is difficult to see why an offer made through a solicitor who is for that purpose an agent, is not a proper offer.

1955 Cal. 101 Affirmed. (KAPUR J.)

International Contractors Ltd. v. *Prasanta Kumar Sur*, 1962 SC 77.

STAMP ACT, S. **56 (2)—executant of instrument—whether entitled to a hearing.**

The question before the Chief Controlling Authority under S. 56(2) being one of construction of an instrument and the application of the Act to it being a pure question of law which may result in paymnt of large amounts by the executants of documents, the Authority has to act judicially when proceeding under S. 56(2) and must on principles of natural justice give a hearing to the executant of the instrument and where an order is passed by it without giving a hearing to the executant its order is liable to be quashed.

1962 SC 1110 Rel. on. (WANCHOO J.)

Board of Revenue, U. P. v. *Sardarni Vidyawati*, 1962 SC 1217 : 1962 ALJ 691.

SUCCESSION ACT, S. **63—proof of will—Registration—when raises presumption of genuineness.**

There is no doubt that if a will has been registered that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding it, where suspicion exists, without submitting the evidence of registration to a close examination.

(In the instant case the Supreme Court went into the entire evidence and reversed the concurrent decisions of the courts below and held that the bald fact of registration was insufficient in the circumstances of the case to dispel the suspicious circumstances and that the propounder had been unable to dispel the suspicious circumstances surrounding the execution and attestation of the will.) (WANCHOO J.)

Purnima Debi v. *Khagendra Narayan Deb*, 1962(3) SCR 195 : 1962 SC 567 : 1962(1) SCJ 725.

S. 213(1)—bar applies to both plaintiff as well as defendant.

It is now well settled that S. 213 is a bar to any right being claimed by a person under a will whether as a plaintiff or as a defendant unless probate or letters of administration of the will have been obtained.

50 Mad. 927 Approved. (WANCHOO J.)

Hem Nolini Judah v. *Mrs. Isolyne S. Bose*, 1962 SC 1471.

Applies also to persons deriving title from legatee or executor.

The words of the section are not restricted only to those cases where the claim is made by a persn directly claiming as a legatee. The section does not say that no person can claim as a legatee or as an executor unless he obtains probate or letters of administration of the will under which he claims. What it says is that no right as an executor or legatee can be established unless probate or letters of administration have been obtained of the will under which the right is claimed and therefore it is immaterial who wishes to establish that right. Whosoever wishes to establish that right, whether it be a legatee or an executor himself or somebody else who might find it necessary in order to establish his right, to establish the right of some legatee or executor from whom he might have derived title, cannot do so unless the will under which the right as a legatee or executor is claimed has resulted in the grant of a probate or letters of administration.

A executed a will in favour of B who bequeathed to C by will properties obtained by him from A. No probate of A's will was obtained. C obtained probate of B's will and relied on it.

Held, as soon as C wanted to establish that B was the legatee of A, he could do so only if the will of A in favour of B had resulted in the grant of probate or letters of administration ; and as that did not happen, C's contention must fail.

(*Ibid.*)

SUPREME COURT—**procedure—dismissal of appeal for non-prosecution—restoration on failure of alternative remedy.**

Where a person who has filed an appeal to the Supreme Court against an order of the High Court dismissing his writ petition, deliberately allows the appeal to be dismissed for non-prosecution on the ground that he was advised that in view of a rule having been issued on his petition under Art. 32, it was not necessary to prosecute the appeal, he cannot, on the petition under Art. 32 being ultimately dismissed, be allowed to get the dismissal of the appeal set aside on the ground that he was wrongly advised. (S. K. DAS J.)

Ujjambai v. *State of U. P.*, 1962 SC 1621.

TENANCY LAWS.—**Assam Fixation of Ceiling on Land Holdings Act, 1957—Constitutional validity.**

The Act as amended by Act XVII of 1957 is protected under Art. 31A of the Constitution ; nor can the Act be attacked as being a colourable piece of legislation.

1959 Assam 147 Affirmed. (GAJENDRAGADKAR J.)

Sonapur Tea Co. Ltd. v. *Deputy Commissioner and Collector of Kamrup*, 1962 (1) SCR 724 : 1962 SC 137.

Bihar Land Reforms Act, 1950, S. 4—redemption decree—effect.

After the issue of the notification and the vesting of a tenure in the State free from all encumbrances a decree in favour of the tenure-holder for redemption of a mortgage created by him in respect of the tenure can no more be given effect to, for the mortgagee cannot carry out the decree by reconveying the tenure to the mortgagor or put him in possession. The mortgagor in his turn also ceases to be entitled to the mortgaged property and therefore the decree for redemption previously passed will become infructuous. Although the Act does not expressly bar a suit by a mortgagor for redemption, that seems to be the practical and inevitable result of it.

But this does not affect the right of the mortgagor. He can establish before the Claims Officer that the mortgagee had realised out of the income of the hypotheca of which he was in possession, more than what was legitimately due to him. If he succeeds in doing so, the Claims Officer will hold that nothing is payable to the mortgagee out of the compensation.

But if he does not file his claim before the Claims Officer and the mortgagee does and the Claims Officer decides the sum due to the mortgagee, such decision will become final under S. 18(3) and the redemption decree in favour of the mortgagor cannot be given effect to.

1957 Patna 564 Reversed. (SARKAR J.)

Sailendra Narayan Bhanj Deo v. *Jagat Kishore Prasad*, 1962 SC 914.

S. 4 (d)—mortgage of entire estate—execution of decree personally against mortgagor.

The words in S. 4(d) are wide enough to include within their sweep execution proceedings even though the amount due may have been claimed by the decree-holder from properties other than those which have vested in the State. The only limitation being that the execution proceedings should be for the recovery of any such money which is due from the proprietor on the strength of a mortgage executed by him in respect of an estate.

In a suit on an anomalous mortgage by a proprietor of properties, the entirety of which constituted an estate under S.2(i), a decree was passed directing that for the satisfaction of the decretal amount the mortgaged properties would be charged preliminarily and that if the decretal amount was not fully satisfied from them the decree-holder would be entitled to proceed against the proprietor personally. Thereafter the estate was notified under the Act and on the application of the decree-holder the Claims Officer determined the amount due to him out of the compensation amount. The decree-holder applied for execution of the decree personally against the proprietor without taking recourse to the remedy available to him under S. 24(5).

Held, the decree-holder was not entitled to do this and that he must first seek to recover the amount determined as due to him as provided by the relevant provisions of the Act before he proceeded to execute the decree personally against the mortgagor.

1957 Patna 575 Affirmed.

Held further, this conclusion followed even on the terms of the decree itself. (GAJENDRAGADKAR J.)

Krishna Prasad v. *Gouri Kumari*, 1962 SC 1464.

Bombay Land Tenure Abolition Laws (Amendment) Act, 1958, Ss. 3, 4 & 6—Constitutional validity.

The combined effect of Ss. 3, 4 & 6 is this : If the tenure-holder has made no application within six months from 10-6-58, i.e. the commencement of the Act,

for a declaration that the tenant under him is not a permanent tenant, every tenant under him who fulfils the condition mentioned in cls. (a) & (b) of S. 4 at once gets recorded in the record of rights as a permanent tenant and all the provisions of the Bombay Taluqdari Tenure Abolition Act 1949 will apply to him as they apply to a permanent tenant.

Under the guise of defining a permanent tenant or changing a rule of evidence, sections 3, 4 and 6 reduce the purchase price which the tenure-holder was entitled on 1-4-57 to get from his tenants under S. 32 H of the Bombay Tenancy and Agricultural Lands Act, 1948. This right of the tenure-holder being a right of property in which he has a fundamental right, sections 3, 4 & 6 which adversely affect such a right retrospectively are unconstitutional and cannot be justified as imposing a reasonable restriction under Art. 19(5) of the Constitution.

Art. 31A cannot also save the impugned provisions as it has no application ; for on 1-4-57 the tenure-holders had ceased to tenure-holders in respect of lands held by non-permanent tenants and the relationship between the tenure-holders and the tenants had changed from that of landlord and tenant to that of creditor and debtor and sections 3, 4 and 6 which affect the right of the tenure-holder as creditor to get a certain sum of money from his tenant as debtor, does not provide for acquisition by the State of any estate or any rights therein nor for extinguishment or modification of such rights.

The Act does not fall within any entry in Lists II and III of the Seventh Schedule to the Constitution and is a piece of colourable legislation. (S. K. DAS J.)

Jayvantsinghji Ranmalsinghji v. *State of Gujarat*, 1962 SC 821.

Bombay Tenancy and Agricultural Lands Act, 1948, S. 25(2)—relief on equitable grounds.

Where a tenancy has been terminated under a statutory provision the landlord acquires a statutory right to the possession of the lands and to eject the tenants. Therefore no relief can be granted to the tenant on equitable principles. Section 29 (3) cannot be construed as conferring such a power. Nor can section 114 of the Transfer of Property Act govern tenancies to which the Act applies because the provisions of S. 114 T.P. Act are inconsistent with the provisions of the Act.

(1955) Bombay 1069 Overruled. (SARKAR J.)

Rajaram Mahadev Paranjpye v. *Aba Maruti Mali*, 1962 SC 753 : 64 Bom LR 569.

"for any three years".

S. 25(2) does not require three successive years of default but is satisfied where the tenant has been in default for any three years.

(*Ibid.*)

S. 25(2) and (1)—effect of relief under sub-sec. (1).

Where relief has been given under sub-section (1) against the consequence of the default for any year that does not wipe out the default itself ; it only prevents the termination of the tenancy, if any, consequent thereon, becoming effective. In spite of the relief granted under S. 25(1) the tenant remains a tenant who made default as mentioned in S. 25(2). Hence where a tenant has committed default in payment of rent for three years the landlord is entitled to an order of eviction under S. 25(2) notwithstanding the fact that the tenant has been granted relief under sub-section (1) against the consequence of default in any of the two prior years.

(*Ibid.*)

S. 29(3)—discretion—whether absolute.

S. 29(3) dos not warrant the making of any order that the authority concerned thinks in his individual opinion that the justice of the case requires. Where a landlord is, under the provisions of the Act, entitled to an order of eviction, an order in his favour must be passed. The words "as he deems fit" do not bestow a power to make any order on considerations *de hors* the provisions of the Act.

(1864) 33 LJ MC 101 (103) Referred to ; (1955) Bom 1069 Overruled.

(*Ibid.*)

Kerala Agrarian Relations Act, 1960—validity.

The main provisions of the Act are clearly within the legislative competence of the State Legislature under item 18 of List II and item 43 of List III of the Seventh Schedule to the Constitution. (WANCHOO J.)

Karimbil Kunhikoman v. *State of Kerala*, 1962 SC 723 : 1962(2) SCA 1 : 1962 KLT 42 : 1962(1) MLJ 213.

Applicability to *Pandaravaka verumpattom* and *Puravaka* lands.

The Act in so far as it affects *Pandaravaka verumpattom* lands and *Puravaka* lands in the former Cochin State is protected by Art. 31A of the Constitution. (GAJENDRAGADKAR J.)

Purshothaman Nambudiri v. *State of Kerala*, 1962 SC 694.

Validity with respect to non-"estates."

In regard to lands which are not "estates" within the meaning of Art. 31A (2) (a) of the Constitution, the whole Act must be struck down as unconstitutional for the following reasons :

(a) The provisions of the Act relating to plantations which make a discrimination between areca and pepper plantations on the one hand and certain other plantations on the other is violative of Art. 14 of the Constitution and these provisions, affecting the entire working of Chapers II and III of the Act which are the main provisions thereof, cannot be severed from the Act and struck down only by themselves ;

(b) S. 58, fixing ceilings on land-holdings, is violative of Art. 14 and is the basis of entire Chapter II of the Act ;

(c) The manner in which progressive cuts have been imposed on the purchase price under S. 52 and the market value under S. 64 in order to determine the compensation payable, results in discrimination and cannot be justified on intelligible differentia which has any relation to the objects and purposes of the Act ; and this provision as to compensation is all pervasive. (WANCHOO J.)

Karimbil Kunhikoman v. *State of Kerala*, 1962 SC 723.

Validity regarding ryotwari lands.

In so far as ryotwari lands in the areas of the State of Kerala which came to it from the State of Madras under the States Reorganisation Act are concerned, the Act is not protected by Art. 31A from attack under Arts. 14, 19 and 31 of the Constitution. (WANCHOO J.)

(*Ibid.*)

Ch. II—Ss. 45, 52, 64 and 72—validity.

It cannot be said that the scheme evolved in Chap. II is a device for taking away any part of the money due to the landowner from the tenant to whom his interest may eventually be assigned. Whatever unfairness might appear because of the difference between sections 45 and 52 on the one hand and sections 64 and 72 on the other is removed by the provision in S. 80. The Act cannot be struck down as a colourable piece of legislation which is beyond the competence of the the State Legislature.

(*Ibid.*)

S. 80—Rules 161 (a) (i) and (ii) and 161 (b) (i) and (ii).

These rules in so far as they take in persons not affected by the Act are *ultra vires* of the provisions of S. 80 and must be struck down on that ground.

(*Ibid.*)

Madhya Pradesh Abolition of Proprietary Rights etc. Act, 1950, S. 2(1) (i)—home farm lands—personal cultivation—whether necessary.

The only condition requisite for the proprietor having certain land treated as his home farm was the fact that the annual papers of 1948-49 recorded that land as his *Sir* and *Khudkasht*. The basis was the record and not actual cultivation or his title to that land.

(1955) Nagpur 983 Not Approved. (RAGHUBAR DAYAL J.)

Haji Sk. Subhan v. *Madhao Rao*, 1962 SC 1230.

S. 3(2)—decree for possession passed after notification—executability.

S. 3(2) means that no person can acquire any right over any land which vests in the State under S. 3(1) subsequent to the vesting, by virtue of a decree passed in his favour. Any rights which accrue to a proprietor under a decree by virtue of his proprietary right will not under the scheme of the Act prevail over the statutory consequences following the vesting, and will be lost to the proprietor. One such right is the right of the proprietor under a decree to obtain possession over certain land. The provisions of sections 4(l) (e), 4(2) and 4(3) add strength to this view.

Where in a suit for recovery of possession by the proprietor a decree for recovery of possession is passed after the estate is notified, the decree becomes inexecutable and such an objection can be taken before the executing Court. The principle that the executing Court cannot question the decree and has to execute it as it stands will have no operation in such a case.

(*Ibid.*)

Ss. 5 and 6—Grant of *profits a prendre* before 16.3.50.

It cannot be contended that interests in the nature of a *profit a prendre* granted by a transfer made before 16.3.50 are saved from being vested in the State for the section only saves them from being void and does not lay down that a transfer made before 16.3.50 shall be binding upon the State. The right claimed by the transferee cannot therefore, be enforced if the State is not prepared to respect those rights for such transactions do not come within any of the saving clauses of S. 5.

1953 SCR 476, held, Overruled by 1959 SCR 265 and 1959 Supp. 2 SCR 339 ; 1959 MPLJ 374 Reversed. (SINHA C. J.)

State of Madhya Pradesh v. *Yakinuddin*, 1962 SC 1916.

Madras Estates Land (Reduction of Rent) Act, 1947—validity.

The Act enacted under the powers conferred on the Provincial Legislature under item 21, List II, of Schedule VII to the Government of India Act, 1935 dealing with land is constitutional. In providing for reduction of rent to the level at which the rents prevailed in the neighbouring area where there was ryotwari settlement it lays down reasonable restrictions on the right of the land holder to hold his estate under Art 19(1) (f).

1958 Andh Pra. 173 (F.B.) Approved.

The attack to the validity of the Act based on reading the term "acquisition" in S. 299 of the Government of India Act in the wide sense of any interference with property even when the title thereto does not pass to the State is no longer a live issue having been concluded by the decision of the Supreme Court in 1961 SC 1684.
(WANCHOO J.)

State of Madras v. *Kannapalli Chinna Venkatachalamaya Sastri*, 1962 SC 1687.

S. 3—Reduction of rent to less than 25%—whether unreasonable.

The reduction of rent to the level of the prevailing rent for the same class of land in neighbouring ryotwari areas is a reasonable basis on which the rent in estates covered by the Act can be reduced. The ratio by which the net income will fall after reduction will depend upon whether the land holder whose rents are being reduced was a rack-renter or a humane person ; in the case of a rack-renter the fall may be heavier while in the case of a humane person the fall may be less. But if the basis on which the reduction is made is the same in both cases and is reasonable, there is no reason for holding that a notification which may in a given case result in a fall of the net income which is even below 25 per centum of the previous net income will necessarily be bad as an unreasonable restriction on the right of the land holder to hold his estate.

1958 Andh Pra. 173 Reversed.

(*Ibid.*)

Orissa Estates Abolition Act (1 of 1952), Ss. 2(i) and 3—homestead—buildings on on raiyati land.

The second category in the definition of 'homestead,' which has not been permitted to the outgoing intermediary, has reference to any building comprised in such estate and not to any building standing on raiyati holding or a portion thereof. The observations of the Supreme Court in 1954 SCR 1 have reference only to such buildings as stood upon the proprietor's private lands like *neej*, *seer*, *zirat* etc. which were in his possession as proprietor or as tenure-holder. Hence buildings standing on lands in which the raiyati interests have been purchased by the proprietor are not affected by the abolition of his interests as a proprietor and such buildings cannot be taken possession of by the Government.

(1958) Cut 411 Reversed. (SINHA C. J.)

Bimal Chandra Sinha v. *State of Orissa*, 1962 SC 1912.

Ss. 2(g) & (h) and 3—proprietor acquiring raiyati interest—whether such interest vests.

The Act is intended to establish direct relationship between the State and the tillers of the soil and to abolish all intermediaries and rent receivers such as pro-

prietors, sub-proprietors, tenure-holders, under-tenure-holders, with a variety of names but did not touch the interest of the raiyat. The same person, by transfer or by operation of law might at the same time occupy different status in relation to the land. He may be in respect of a particular area which is geographically included in the estate, the proprietor. That land may be held by a raiyat not directly under a proprietor but under a tenure-holder who holds directly under the proprietor. The proprietor may have acquired the interest of the raiyat. Thus the proprietor in his capacity as owner of the estate holds the entire estate and he may have by purchase acquired the interest of a raiyat paying rent for the raiyati interest to his immediate landlord, the tenure-holder, who in his turn may be liable to pay rent to the proprietor. Such land though geographically within the ambit of the estate is not part of the estate. The fact that the rent payable by the proprietor as raiyat in respect of such land will form part of the assets which have, under S. 26, to be included in the gross assets in determining the compensation will not mean that the raiyati interest acquired by the proprietor also becomes vested in the State as a result of the estate being notified under S. 3 and therefore, the State Government cannot dispossess the proprietor from lands in which he has acquired the raiyat's interests.

(1958) Cut 411 Reversed.

(*Ibid.*)

Orissa Tenants Protection Act, 1948, S. 7(1)—issue as to existence of relationship of landlord and tenant—Jurisdiction of Revenue Court.

S. 7(1) postulates the existence of relationship of landlord and tenant between the parties and proceeds to provide for the exclusive jurisdiction of the Collector to try the five categories of disputes that may arise between them. Even on a liberal construction of S. 7(1) it will be difficult to uphold the argument that a dispute as regards the existence of relationship of landlord and tenant falls to be determined by the Collector under S. 7(1).

Hence where in a suit for an injunction the defendant claims to be the tenant from the plaintiff and claims protection under the Act and an issue is framed as to the status of the defendant, it has to be tried by the Civil Court. The suit cannot be dismissed on the ground that the Civil Court has no jurisdiction to try the suit. If the Court holds that the relationship has not been established it may proceed to deal with the suit on merits.

1957 Orissa 17 Reversed. (GAJENDRAGADKAR J.)

Magiti Sasamal v. *Pandab Bissoi*, 1962 SC 547 : 1962 (3) SCR 673 : 1962 (1) SCJ 636.

Punjab Resumption of Jagirs Act, 1957, S. 2(1)(a)—*Cis-Sutlej*—whether Jagir.

Cis Sutlej Jagirs in Punjab are "Jagirs" falling within S. 2(1)(a) and are as such liable to be resumed under the provisions of the Act.

(VENKATARAMA IYER J.)

Amarsarjit Singh v. *State of Punjab*, 1962 SC 1305.

U. P. Large Land Holdings Tax Act, 1957—validity.

The Act, in substance and in fact, imposes a tax on land holding and as such is within the competence of the State Legislature. The Act does not infringe the fundamental rights guaranteed by Article 14 or 19 of the Constitution, nor can the Act be impugned as a piece of colourable legislation. (GAJENDRAGADKAR J.)

Jagannath Baksh Singh v. *State of U. P.*, 1962 SC 1563

S. 5(1)—validity.

The Section is not void as infringing the right guaranteed by Articles 14 and 19(1) (f) of the Constitution.

(*Ibid.*)

"may".

The word "may" in the context cannot mean "shall" or "must" and it cannot be contended that the section imposes an obligation on the State Government to adopt different multiples in different districts and in reference to different classes of land.

(*Ibid.*)

Schedule—validity.

The rates fixed by the Schedule do not contravene Articles 14 and 19 of the Constitution.

(*Ibid.*)

U.P. Tenancy Act, S. 230—suit for injunction—*Res judicata.*

The Fourth Schedule to the Act does not provide for a suit by a person claiming to be the proprietor of a property and in possession thereof praying for a declaration of his title and for an injunction against another who is trying to interfere with his title. Therefore, under S. 230 the Revenue Court has no exclusive jurisdiction to entertain a suit of that nature and the Civil Court's jurisdiction is not ousted.

It follows, therefore, such a suit will not be barred by *Res judicata* by the decision on the issue of title by a Revenue Court in a previous suit by the defendant for a share in the profits of the property.

1954 Mad 778 Ref. to ; View of GURTU J. in 1954 All 801 Not Approved.
(SUBBA RAO J.)

Bhagwan Dayal v. *Reoti Devi*, 1962 SC 287.

TIBIA COLLEGE ACT, 1952—**validity.**

The Act providing for the transfer of management of the college from the old Board to the new Board was within the legislative competence of the Delhi State Legislature and does not violate the fundamental right under Arts 14, 19 or 31 of the Constitution, nor can it be attacked as a piece of colourable legislation.

1950 SCR 869 Relied on. (S. K. DAS J.)

Board of Trustees, Tibia College, Delhi v. *State of Delhi*, 1962 SC 458.

TORT—**rash and negligent driving—presumption of negligence—when can be drawn.**

See *Gobald Motor Service* v. *Veluswami*, 1962 SC 1 : 1962 (1) SCR 929 : 1962 (1) SCJ 206 : 1962 (1) MLJ 105.

Vicarious liability—State—whether immune.

The State like any other private employer is as much liable for tort in respect of tortious acts committed by its servants acting within the scope of their employment and functioning as such.

5. Bom HCR App 1 (Cal) Relied on ; 1957 Raj 305 Affirmed.

When the rule of immunity in favour of the Crown based on Common Law in the United Kingdom has disappeared from the land of its birth by the enactment of the Crown Proceedings Act, 1947, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution.

(SINHA C. J.)

State of Rajasthan v. *Mst. Vidhyavati*, 1962 SC 933 : 1962 (2) SCA 362.

TRANSFER OF PROPERTY ACT, **Ss. 43 and 6(a)—transfer by heir-apparent—when saved.**

While S. 6(a) enacts a rule of substantive law, S. 43 enacts a rule of estoppel which is one of evidence. The two provisions operate on different fields and under different conditions and there is no ground for reading a conflict between them or for cutting down the ambit of the one by reference to the other. Both of them can be given full effect on their own terms in their respective spheres. Thus if a transfer is statedly of an interest of the character mentioned in S. 6(a) it will be void whereas if a transferor represents that he has a present interest when he has in fact only a *spes successionis*, the transferee is entitled to the benefit of S. 43 if he has taken the transfer on the faith of the representation and for consideration.

1915 Mad. 972 Approved ; 1953 Mad. 637 (FB) (Overruling 1933 Mad. 795) Affirmed ; 57 All 474 (differing from 4 Luck 622) Approved.

Further for the purposes of the section it matters not whether the transferor acted fraudulently or innocently in making the representation and what is material is that he made a representation and the transferee acted on it. But if the transferee knew as a fact that the transferor does not possess the title which he represents he has, he cannot be said to have acted on the representation. S. 43 will then have no application and the transfer will fail under S. 6(a).

(VENKATARAMA IYER J.)

Jumma Masjid v. *K. Deviah*, 1962 SC 847 : 1962(2) SCA 422 : 1962 (2) SCJ 303.

S. 43—decisions on transfers by minors—whether useful.

See *ibid.*

TRIBUNAL—**Procedure.**

Where a statutory tribunal has to act judicially in discharging its functions, all that is required is that the other party should have an opportunity of adequately presenting his case. But what the procedure should be in detail will depend upon the nature of the tribunal. That is a matter which can be provided by bye-laws or Regulations if necessary.

1915 AC 120 Ref. to. (WANCHOO J.)

Board of High School and Intermediate Education U.P. v. *Ghanshyamdas Gupta*, 1962 ALJ 776 : 1962 SC 1110.

TRUSTS ACT, S. 48—**when one of several co-trustees may act.**

If a trust deed under which more trustees than one are appointed, expressly provides that the execution of the trust may be carried out not by all but by one or more of them then of course the matter will be governed by that special provision and not by the terms of S. 48.

[On a construction of the trust deed in the case the Court held that it was not intended thereby to provide for an exception to S. 48.]

(GAJENDRAGADKAR J.)

Janakirama Iyer v. *Neelakanta Iyer*, 1962 SC 633.

S. 52—alienation by trustee in favour of near relative—validity.

See (*Ibid.*)

S. 63—improper alienation—right of beneficiary to sue for possession.

In regard to public charitable trusts the beneficiaries are entitld to sue for setting aside alienations of trust properties improperly effected by trustees and to ask for restoration of possession of the said properties to the trustees newly appointed. S. 62 cannot be read as exhaustively dealing with all the remedies available to the beneficiary.

20 MLJ 151 Approved ; 67 IA 251 Rel. on ; 1931 PC 196 Distinguished.

(*Ibid.*)

S. 84—whether exhaustive.

The argument that the only cases where equitable principles can be invoked are cases falling under S. 84 and that S. 84 is exhaustive in that sense cannot be accepted.

(*Ibid.*)

Trust—Charitable purpose—object of general public utility—political purpose.

Even though the concept of charity under the Indian Law might be wider than as understood in England, particularly under the residuary head "advancement of an object of general utility," it will not include a political purpose in the sense of a propaganda for the achievement of a political purpose e. g., through a newspaper.

66 Ind. App. 241 and 71 Ind. App. 159 Rel. on ; 1957 Mad. 83 Reversed.
(AYYANGAR J.)

Laxman Balwant Bhopatkar v. *Charity Commissioner, Bombay*, 1962 SC 1589.

U. P. MUNICIPALITIES ACT, 1916, **S. 13-D—subsequent payment of arrears.**

The second proviso cannot be so read as to mean that a disqualification subsisting on the day of nomination can be wiped off completely by subsequent payment of arrears of tax.

1954 SCR 817 Followed ; 1953 Cal. 542 Approved. (S. K. DAS J.)

Mangoo Singh v. *Election Tribunal, Bareilly*, 1957 SC 871.

Notice of demand whether necessary.

It cannot be contended that the expression "to which S. 166 applies" in clause (g) means that a bill of the sum due must be presented to the person liable for it, as required by section 166 before he can come within the mischief of the clause ; nor does the use of the expression "demand" make it essential that a demand notice must also be served as required by S. 168 of the Act.

Ibid.)

WILL—**registration—whether dispels suspicious circumstances.**

See under Succession Act, S. 63. 1962 SC 567.

ZAMINDARI—**occupancy rights—presumption in favour of ryot—when rebutted.**

In any action by an inamdar to evict his tenants and by a zamindar prior to the commencement of the Madras Estates Land Act 1908 to evict his raiyats from their holdings, the burden was on the plaintiff to make out the right to evict by proving that the grant included both the *melvaram* and the *kudivaram* interests or that the holders of the land or their predecessors were let into possession by the inamdar or the zamindar under a terminable lease. This presumption rests not on the ground of burden that whosoever alleges title and claims relief on that footing must establish it ; it has its roots in the system of land tenure and in the custom of the area in which the lands are situate and applies in a suit between persons claiming under the ryot as well as in a suit against the ryot by the zamindar.

Case-law discussed.

After the death of one T, a ryot of certain lands in a zamindari, one of his heirs filed a suit against the other heirs for partition and separate possession of his share in the said lands. The defendants contended that T had no proprietary rights in the said lands and that occupany rights had accrued to them by virtue of the Madras Estates Land Act 1908. There was no evidence to show that the occupation of the lands by T commenced under the zamindar or as to the terms on which T or his predecessors were let into possession but it was proved that T and his descendants had continued in possession uninterruptedly till 1908.

Held (decreeing the suit), in the light of the presumption that the zamindar is, unless the contrary is proved, the owner of the *melvaram* and the ryot of the *kudivaram*, the inference was irresistible that T was the holder of occupancy rights in the lands which devolved upon his successors.

Held further that the recital in the *muchalikas* executed by T in favour of the zamindar that if at the end the term of the *muchalika* the zamindar should lease out the lands to anyone for a *cist* advantageous to him T would not object thereto, was by itself insufficient to justify the inference that T's tenure was precarious and that T was a mere tenant-at-will and not the owner of occupancy rights. (SHAH J.)

Sunkavilli Suranna v. *Goli Sathiraju*, 1962(3) SCR 653 : 1962(1) SCJ 331 : 1962 SC 342.

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